

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 9267

JOINT APPENDIX TO BRIEFS

United States Court of Appeals

DISTRICT OF COLUMBIA

454

**JAMES M. JOHNSTON AND JAMES LEMON,
Trading as Johnston, Lemon & Company,**

Appellants,

*United States Court of Appeals
for the District of Columbia*

vs.

FIL. AUG 23 1946

PHILIP K. REILY,

Appellee.

George W. ...
CLERK

**Appeal from the District Court of the United States
for the District of Columbia**

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9267

JAMES M. JOHNSTON AND JAMES LEMON,
Trading as Johnston, Lemon & Company,
Appellants,

vs.

PHILIP K. REILY,
Appellee.

Appeal from the District Court of the United States
for the District of Columbia

JOINT APPENDIX TO BRIEFS

1 IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA

PHILIP K. REILY,
719 Fifteenth Street N.W.
Washington, D. C.,

Plaintiff,

vs.

JAMES M. JOHNSTON and
JAMES LEMON,
trading as Johnston, Lemon & Co.,
Southern Building
Fifteenth and H Streets N.W.
Washington, D. C.,

Defendants.
Civil Action
No. 19,589

Filed Nov. 26, 1945. Charles E. Stewart, Clerk.
Amended Complaint for Damages
(Breach of Contract)

This amended complaint is filed with leave of Court.

1. This is an action for damages for breach of contract by the plaintiff Philip K. Reily, against the defendants, James M. Johnston and James Lemon, trading as Johnston, Lemon & Company. The amount in controversy is in excess of Three Thousand Dollars (\$3,000), exclusive of court costs.

2. The plaintiff, Philip K. Reily, sues the defendants, James M. Johnston and James Lemon, trading as Johnston, Lemon & Company, and each of them, for damages because the defendants have failed and refused to abide by their oral agreement or implied agreement made with the plaintiff, and have failed and refused to turn over to the plaintiff one-half of the profit accruing to defendants or, to-wit,

\$772.06 and 4,000 shares of stock of the Barium Stainless Steel Corporation due the plaintiff in connection with the 1941 public financing of the Barium Stainless Steel Corporation under Securities and Exchange Commission registration and pursuant to an agreement and understanding between them or to pay the plaintiff for his services in connection therewith. The said stock had a market value on April 24, 1943, on the New York Curb Exchange of Ten Thousand Five Hundred Dollars (\$10,500) for 4,000 shares of stock at \$2.6250 per share.

WHEREFORE, the plaintiff demands judgment against the defendants and each of them as follows:

1. That the defendants be required to turn over to plaintiff 4,000 shares of Barium Stainless Steel Corporation stock.

2. That in the event that defendants do not have said stock or have disposed of said stock, the plaintiff have a judgment against the defendants and each of them for an amount based upon the highest market value of said Barium Stainless Steel Corporation stock within a reasonable time after the disposition of said stock by the defendants and each of them, which said value shall not be less than Ten Thousand Five Hundred Dollars (\$10,500) for 4,000 shares at \$2.6250 per share and \$772.06 for cash profits received by defendants besides costs.

3. That in the alternative plaintiff be awarded judgment against defendants for the reasonable value of services rendered to the defendants.

DORSEY K. OFFUTT
CARLTON F. ALM

Attorneys for Plaintiff
613 Woodward Bldg.
REpublic 1776

Demand for Jury Trial

The plaintiff demands a jury trial of all the issues in the above-entitled cause.

DORSEY K. OFFUTT
CARLTON F. ALM

Service of a copy of the foregoing Amended Complaint For Damages is hereby acknowledged this 20th day of November, 1945.

FREDERIC N. TOWERS
Attorney for Defendants

3 *Answer to Amended Complaint*

First Defense.

The Complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense.

Defendants deny the allegations contained in paragraphs 1 and 2 of the Amended Complaint and deny that they, or any of them, have failed or refused to abide by their oral or implied agreement made with plaintiff to turn over to plaintiff any sum of money or property or shares of stock to which plaintiff is rightfully entitled for any services rendered by plaintiff to defendants. Defendants further deny that plaintiff is entitled to receive from said defendants any shares of stock of the Barium Stainless Steel Corporation.

Third Defense.

The oral contract upon which the plaintiff relies is voidable under the Statute of Frauds, Title 12, Sec. 304, District of Columbia Code, 1940 Edition.

Counter-Claim

Defendants claim from the plaintiff the sum of \$583.36, representing the amount by which plaintiff's account was overdrawn or overpaid, or both, at the time of severance of his business relations with defendants.

FROST, MYERS & TOWERS

By F. N. TOWERS

Attorneys for Defendants

723 15th Street, N. W.

4 *Answer to Amended Counter-Claim*

The plaintiff in answer to amended counter-claim of defendants adopts the previous answer to cross-complaint filed by plaintiff herein and plaintiff's affidavit in opposition to summary judgment filed herein.

DORSEY K. OFFUTT

CARLTON F. ALM

Attorneys for Plaintiff

613 Woodward Bldg.

REpublic 1776

Received January 11, 1946

No Objection as to form.

F. N. TOWERS

Attorney for Defendants

Plaintiff's Instruction No. 1

5 The jury is instructed that if you find that the plaintiff, Reily, and the defendant, Johnston, entered into an oral agreement whereby they agreed that Reily was to continue his efforts in connection with the Barium Steel Company and that if any profits should accrue to Johnston, Lemon Company from Barium Steel that they were to

equally share such profits, and if you further find that Reily did continue his efforts in connection with the Barium Steel Company and thereby assisted or contributed to Johnston, Lemon and Company in the accrual of profits, your verdict should be for the plaintiff.

Granted as amended.

6

Plaintiff's Instruction No. 2

The jury is instructed that the plaintiff's burden to establish his case by a preponderance of the evidence means the greater weight of the evidence. Such burden of proof is not necessarily determined by the number of witnesses testifying to a particular state of facts but means that the testimony of the plaintiff must have a more convincing effect than that opposed to it.

Granted.

7

Plaintiff's Instruction No. 3

The jury is instructed that if you believe that any witness willfully has testified falsely as to any material matter, you are at liberty to disregard all or any part of the testimony of that witness.

Granted.

8

Defendants' Instruction No. 1

If the plaintiff is to recover in this case by reason of his having brought the Barium Stainless Steel Corporation deal to the defendants, he must prove by substantial evidence that he assisted or contributed as co-underwriters in bringing about the choice of defendants.

Hecht Co. v. Whiteford, 78 U. S

App. D.C. 929, 137 F(2d) 929.

Granted as amended.

Defendants' Instruction No. 5

The party who asserts the affirmative of an issue must carry the burden of proving it. Such burden of proof is established by a preponderance of the evidence, which is determined not alone by the greater number of witnesses testifying to a particular state of facts. It means that the testimony on behalf of the party carrying the burden must have greater weight in your estimation, have a more convincing effect than that opposed to it. If you believe that the testimony on any essential point is evenly balanced, then your finding as to that point must be against the party carrying the burden of proof.

Granted

10 IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA

PHILIP K. REILY

Plaintiff

VS.

JAMES M. JOHNSTON AND JAMES LEMON
Trading as Johnston, Lemon & Co.

Defendants.

Civil

No. 19589

Filed Jan. 21, 1946. Charles E. Stewart, Clerk.

VERDICT AND JUDGMENT

This cause having come on for hearing on the 14th day of January, 1946, before the Court and a jury of good and lawful persons of this district, to wit:

Julius Seligson
 Bruce M. Wall
 Henry M. Ingram
 Frank Brahler
 Aubrey J. Kendall
 James W. McDermett

Stephen Wargo
 Baxter B. Cramer
 James H. Mathiot
 Kimberly Bowman
 Stephen Tilley
 Frank E. Wall

who, after having been duly sworn to well and truly try the issues between Philip K. Reily, plaintiff and James M. Johnston and James Lemon, trading as Johnston, Lemon & Co., defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 21st day of January, 1946, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendants by reason of the premises is the sum of Eighty-two hundred Nine 56/100 Dollars, (\$8209.56) with Interest at 6% from April 1, 1943.

WHEREFORE, it is adjudged that said plaintiff recover of the said defendants the sum of \$8209.56 with interest at 6% from April 1, 1943 together with costs.

CHARLES E. STEWART, *Clerk*,
 By GEORGE A. WATTS,
Assistant Clerk.

By direction of
 JUSTICE MORRIS

11

PHILIP K. REILY

Plaintiff

vs.

JAMES M. JOHNSTON, *et al.*,
 trading as Johnston, Lemon & Co.,

Defendants
 Civil Action
 No. 19589

NOTICE OF APPEAL

Notice is hereby given this 25th day of January 1946, that James M. Johnston and James Lemon, trading as Johnston, Lemon & Co., hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 21st day of January, 1946, in favor of Philip K. Reily, plaintiff, against said James M. Johnston and James Lemon, trading as Johnston, Lemon & Co.

FROST, MYERS & TOWERS
By FREDERIC N. TOWERS
Attorneys for Defendants.
723 15th Street, N.W.
Washington, D. C.

12

M E M O R A N D U M

1946 Jan. 28 Supersedeas Bond of Deft. on appeal in sum of twelve (12,000) thousand dollars with U. S. Fidelity & Guaranty Co., surety-received approved by Morris J & filed.

13

Statement of Points Under Rule 75(d)

As provided in Rule 75(d) of the Rules of Civil Procedure, there is included below a concise statement of the points on which appellant intends to rely on this appeal:

1. The Court erred in admitting in evidence plaintiff's Exhibit No. 7, purporting to be a letter from J. A. Sisto dated November 18, 1940, addressed to T. Y. Milburn.

2. The Court erred in overruling defendants' Motion for Directed Verdict.

3. The plaintiff failed to produce substantial evidence that he was the procuring cause in bringing to defendants the 1941 Barium Stainless Steel Corporation underwriting.

4. There was no consideration for defendants' alleged oral agreement to share profits realized by said defendants as a result of the 1941 Barium Stainless Steel Corporation underwriting.

FROST, MYERS & TOWERS
By FREDERIC N. TOWERS

Attorneys for Defendants.

14 Copy of the above Statement of Points mailed February 7, 1946, to Messrs. Dorsey K. Offutt and Carleton F. Alm, Attorneys for Plaintiff, Woodward Building, Washington, D. C., postage prepaid.

FROST, MYERS & TOWERS
By FREDERIC N. TOWERS
Attorneys for Defendants.

* * * * *

23

PROCEEDINGS

* * * * *

29 MR. TOWERS: The defendants have two key witnesses. They are the sine qua non of the case. They are the parties, I might state, with whom the deal in connection with which the plaintiff claims compensation originated. They are in New York. They are in the
30 the brokerage business. One of them is the president of the Barium Steel Company. The other one is the principal underwriter who underwrote this deal.

Now, we have taken their testimony. They are beyond the jurisdiction of this Court. Their depositions show that they are residents respectively in New York State and New Jersey. Efforts have been made to get them to come here

voluntarily. We could not get them otherwise to testify.

We intend, therefore, to read these depositions to the jury. They are brief, but very much to the point.

* * * * *

34 THE COURT: Let me make this suggestion—
by the way, all of this is by deposition, isn't it, both
the attack and the substantive evidence of Sisto?

MR. TOWERS: Our defense is in deposition form,
your Honor.

THE COURT: No. You said some questions asked by
the other side might improperly impugn the credibility of
the witness Sisto, didn't you?

MR. TOWERS: Oh, yes, sir. Other depositions.

THE COURT: Well, that is in the form of deposi-
tions, isn't it?

MR. TOWERS: Yes, sir.

35 THE COURT: Well, suppose when we get to
that point, you both have the benefit of depositions,
and you know what the question is going to be, can't
you now agree, inasmuch as there will be a question about
it, signify to me that that is the point at which you wish to
object to the asking of the question, and I will excuse the
jury and we will have it out then in the light of what the
testimony then is.

MR. TOWERS: Yes, sir.

THE COURT: Now, will you agree to that, Mr.
Offutt?

MR. OFFUTT: Yes, your Honor, surely.

MR. TOWERS: I have no further matters, your Honor.

THE COURT: Have you anything, Mr. Offutt?

MR. OFFUTT: Nothing, your Honor.

* * * * *

37

PHILIP K. REILY,

* * * * *

DIRECT EXAMINATION

BY MR. OFFUTT:

Q Will you state your full name, Mr. Reily? A Philip K. Reily.

* * * * *

Q Mr. Reily, what kind of business are you in?
38 A I am in the general security business.

Q And how long have you been in that kind of business? A 17 or 18 years.

Q And where have you been engaged in that business?
A Most of the time in Washington.

Q Would you explain a little bit about that business, please? For example, explain to us the difference between a retailer and wholesaler. Just give us a general idea of the business itself. That is a big order, I know. A It is. Of course, the majority of men that are known as salesmen in the securities business, retail securities to individual investors. They have their own individual clients. There are

a smaller number of men who act as wholesale salesmen, who call upon dealers to get them interested in a new offering; or maybe it is not a new security, necessarily, but it will be a large offering for distribution to investors. Those dealers, if they like the dealer, join what we call a selling group or syndicate, and usually sign a letter known as the syndicate letter, which provides the profit of that dealer, and they, in turn, through the retail salesman, distribute the securities to their clients.

Q Now, I don't know how well the jury understands that, but take the Ford Company, for example. Suppose they organized and decided to sell stock. Would you tell us, please, how that stock would ultimately get to the retail purchaser of stock? A Well, primarily they would
39 make a negotiation with a principal underwriter.

Q When you say principal underwriter, what do you mean by that? A I mean by that, in case of a large issue, there may be a number of underwriters; but one of them is known as the principal underwriting group. They make a contract to determine the price at which the security will be offered, the profit that will go to the underwriter, and when that is all arranged and the security has cleared through the S.E.C. and become eligible for a sale, a syndicate is formed. The syndicate member gets part of the gross profit that is allowed to the underwriter. He is a syndicate member and he gets a part of that. The difference between what he gets and the gross profit is the underwriter's profit.

Does that answer your question?

Q Now, the underwriter, just what does the underwriter do in the picture? A Well, the underwriter, first of all, is a counsel in a financial way to the issuing company to determine the best type of security to offer, under the circumstances, possibly, and how much, what price should be put on it, whether it should be a common stock or preferred stock or a bond or a note, and of course negotiates for as

40 large a profit as he can reasonably negotiate to do that business, part of which he has to give up to his selling group members throughout the country that assist him in the retailing of the stuff.

Q When you speak of the selling group members, are they the wholesalers or retailers? A They are the retailers. They are the people I call on when I got out as a wholesale salesman.

Q And in your operation of this business, have you been a wholesale or retail salesman? A Since 1934 I have been almost entirely wholesale.

Q When did you become connected with the Johnston-Lemon Company? A I became connected with them approximately November, 1939.

Q Just immediately prior to that where were you employed and what kind of work were you doing? A In 1934 I formed a partnership with Lewis A. Mayhew, and the partnership was primarily formed for the purpose of distributing blocks of securities wholesale.

Q And where were your offices located? A My offices were in the Shoreham Building in Washington.

Q When did you cease to operate in that partnership?
A That partnership ceased automatically when my partner died.

41 Q When was that? A February, 1938, I think it was.

Q Did you continue on in that location, operating alone?
A I did.

Q And between that time and the time you became associated with the Johnston-Lemon Company, were you located at the same address? A Same address.

Q What was the nature of your business during that period of time? A Still wholesale.

Q Will you explain to us how you became associated and connected with the Johnston-Lemon Company? A Of course, I had known the partners of the Johnston-Lemon Company for some number of years, calling on them as we

did other dealers. They were particularly good customers of ours. We made it our business to know not only the partners but the salesmen, and I had, after my partner died, a very close acquaintanceship with all of the partners, I think.

Q You mean all the partners of the Johnston-Lemon Company? A Of the Johnston-Lemon Company, yes. At that time my recollection is there were four.

42 Q Who were they? A Mr. Johnston, Mr. Lemon, Mr. Nees, and Mr. Gram.

Q And that is N-e-i-s-s, the Nees name? A I am not sure how he spells it.

Q Are they in the wholesale or retail? A They are primarily a retail house. They are not members of any big exchange, as far as I know. I mean by that, we mean New York Exchange. They are members, I believe, of the Washington Stock Exchange, but they primarily deal in unlisted securities. I think while I was there their volume was largely in unlisted securities, and they are what we call in our business a syndicate house, meaning that they specialize in the distribution of securities in large distributions throughout the country; they participate in their Washington territory.

Q Tell us how you became associated with them and how you did that. A Well, Mr. Johnston and Mr. Lemon made an appointment with me to discuss an offering that was then being prepared. They had an opportunity to secure a specified territory in the distribution. They were nice enough to take me to lunch and we went to their club. It was then known as the Racquet Club. We discussed the proposed new offering in considerable detail. It was the stock of the Bank of America, of California, which was being sold by the Trans-America Corporation. That

43 sale was being brought about, to the best of my knowledge, by the fact that Congress had passed a law which prohibited a corporation from owning more than 10 percent of the capital stock of a national bank.

They owned substantially more than 10 percent, so they were given some reasonable length of time during which to rid themselves of that stock. They had been selling the stock for some time through a syndicate in which I did not participate, and which Mr. Johnston told me they had not particularly participated in, but a new syndicate was being formed and his firm had been offered the wholesale of that stock in nine southern states. I have worked largely in my southern states. My best dealer contacts or customers are in the South. He and Mr. Lemon told me about the offer, and asked me if I would be interested in joining their firm to wholesale that stock in the nine states.

I probably should say that that was a very inviting offer for two reasons: the commission was 50 cents a share, so Mr. Johnston told me, which would mean that on my 50-50 basis I would get 25 cents a share on any stock that was sold in the nine states, and equally important was the fact that under the law a national bank stock is automatically qualified for sale in any state, so that we didn't have to worry about going into the individual states and getting the
 44 stocks qualified, or blue-skied, as we call it, to get it eligible for sale. It was automatically eligible, because it was a free stock.

To be able to sell the free stock in the nine southern states, with my ability to sell it, was very inviting, plus the liberal commission.

Q You said 25 cents of the commission, 50 cents being the commission on each share of the stock. A Mr. Johnston told me they had been offered 50 cents a share wholesale.

Q Can you tell us what the ordinary practice or usual practice among wholesalers is as to sharing the commission? A I have no way of knowing the usual practice other than hearsay, except my own experience.

Q What has been your experience? A My experience has been that I would get 50 percent of any commission or

any profit that I made in any transaction involving securities for the firm that I was employed by.

MR. TOWERS: If the Court please, just at that point, since Mr. Reily states that he doesn't know, he doesn't purport to convey to the jury or to the Court anything of a customary nature, and since he states it has been his experience, I take it in other transactions, not in this, that he has been allowed 50 percent of the wholesale commission; I think that is *res inter alios acta*, or it is a thing
 45 apart or separate from any question in this case, and he, himself, states that his opinion in this regard is based upon hearsay. I therefore move that his answer be stricken to that extent.

THE COURT: Well, I would think, Mr. Offutt, that the only two ways in which evidence could come before this jury on that question would be either an expressed contract or agreement on the part of these defendants in the instant transaction or testimony as to what the generally prevailing custom in that particular type of business in that community was.

Now, I don't think he did give either one of those.

MR. OFFUTT: No.

THE COURT: I think the objection is rather well taken in the instant question.

MR. OFFUTT: Yes. The second part of your remark I was going into next, but I don't think he covered the first one at all.

THE COURT: Of course, he says that what he knows about it is hearsay. Well, one has to testify as to prevailing custom from knowledge of that custom. There may be some element of hearsay about it, but it has got to be a bit more than that. It has got to be experience with it and observation of it.

MR. OFFUTT: Yes, your Honor.

BY MR. OFFUTT:

46 Q Do you know the prevailing custom in this location as to the commission received by wholesale salesmen? A I don't know any wholesale salesmen in this community.

Q Now, you have spoken already about the conference you had with Mr. Johnston and Mr. Lemon. Where did that take place? A At what was then the Racquet Club. I think it is now called the University Club, on Sixteenth Street, in Washington.

Q Did you accept that proposition they gave you? A Yes.

Q What was the arrangement, if any, as to your compensation? A Compensation in that particular question was 50 percent of the profit in the sale of the Bank of America stock. That was what I was primarily employed to do, sell that stock.

Q Now, thereafter was there at that time or thereafter any arrangement made as to your compensation for the sale by you as a wholesale salesman of any other stock? A Well, there was one specific discussion, meaning a stock that was named by name, and there was also the expression that they hoped to have other things for me to wholesale if, as, and when they became available.

47 Q Do you recall what stock that was? A The stock other than Bank of America was the stock known as San-Nap-Pak Manufacturing Company.

Q Was any of that stock disposed of by you? A Yes. I sold some of that stock.

Q Were you compensated at that rate? A Well, I was compensated in that matter even more liberally than 50 percent, as Mr. Johnston told me that he had made arrangements for a 10-cents-a-share wholesale commission on that stock and they credited me with 10 cents.

Q Now, after you became associated with the Johnston-Lemon Company following that conference, did there come a time—strike that.

Was there any other agreement made at that conference with reference to any other matters? A Well, at that particular conference the only other specific agreement was that I would be allowed the usual, or, in other words, the 50 percent of profit on any transactions that I made for the firm. I have some retail accounts, and I was told that I would get the 50 percent commission, or 50 percent of the profit. It isn't necessarily a commission. It might be a profit without being a commission.

I would get 50 percent of the profit in any transaction that I made that the house accepted.

Q And did you begin working with the firm following that conference? A Very shortly thereafter.

Q After you began working with the firm, did there come a time when you had a further discussion with any of the members of that firm regarding Barium Stainless Steel? A I did.

Q Tell us about when that was. A That was either shortly before I actually began my duties with Johnston, Lemon & Company, or about the time that I did begin, when I sat down with Mr. Johnston in his own private office and told him that I had for several months at that time specifically worked again on the Barium Stainless Steel matter.

Q Had you previously worked on that Barium Stainless Steel Corporation matter before coming with the Johnston-Lemon Company? A Yes, some years before. My first interest in Barium Stainless Steel began in August 1936.

Q Now, going back to this conference which you say was in Mr. Johnston's private office in the Southern Building—

A That is right.

Q You had this conference there? A That is right.

Q Tell us what transpired at that conference. A Well, at that conference I told him that I had been trying to find some financial relief for the Barium Company.

I believe I told him I had two reasons for doing so. One reason was that we had been in the original distribution of the stock, had sold it fairly successfully, and that the stock had gone down in price, which is not a healthy situation for a wholesaler, and furthermore I hoped to make profit in any new business or arrangement that I could do in behalf of Barium.

I told him that I had been more specifically working at that time with Mr. T. Y. Milburn, in the Barr Building, and I had carried my own expenses up to that point, of course, since I was a principal in my own little firm, and that I wished to continue to work out the Barium matter if it could be done; that I was perfectly willing to do it on my own, at my own expense, as I had previously, or if he felt that I should do it in the name of Johnston-Lemon Company, since I had become employed by them, that would be agreeable to me too. He immediately, without hesitation, stated that since I had become associated with his firm, he thought that I should continue my activity in their name and that they should have a participation.

Q Did you say participation? A Participation. And I use that word with considerable thought and memory. I am sure that that is the word he used, that his firm
50 should have a participation in anything that I might develop out of Barium, or that I might develop out of any other business.

Q What is meant by "participation" in your business? A It means that we would share any profits that might be gained out of any transaction that I could develop for the Barium Company.

Q Who would share? A Johnston, Lemon & Company and I could share it, then. It would not be just mine.

Q Was any discussion had about how you would share it? A The only discussion that we had in regard to my remuneration was that I would get 50 percent of any profits that I made for the firm of Johnston, Lemon & Company,

on any business that justified it. That was the only contract I ever had with them.

Q Was that in writing? A No, sir.

Q To your knowledge, do you know of any contracts that are in writing, like that, with the Johnston-Lemon Company? A I don't know of any; no, sir.

Q Did he suggest that it be in writing? A No, sir.

Q What is the custom in your business as to contracts in writing? A I have never had a written contract
51 with any brokerage firm that I have worked for before, during my employment with Johnston-Lemon, or since my employment with them. I am employed today, and I have no written contract.

Q By the way, in connection with your business, if I, for example, or any individual, wanted to buy a lot of stock from a salesman in the brokerage business, do they do that by writing, make a written order of it, or is it done orally? A It is done orally.

Q Is that the general practice and custom in the brokerage business? A It is.

Q How do they do it orally? Can you give us an example of how it is done? A You mean the actual placing of an order?

Q Yes. A Well, the customer would probably call up on the phone, if he is established with the firm. If he is not established with a brokerage firm, he has to open an account, and he would have to go in the office. But once he is known to any member of the firm or by a salesman, and the salesman qualifies the man as being responsible, his order is executed as a result of a telephone order. The man might pick up the phone and give me an order to buy or sell a
52 security for him. I do it without question, if I know the man.

Q If I got an idea now that I wanted to buy 500 shares of Barium Steel, I could call Johnston-Lemon on the phone and get it? A If you got me on the phone I could do it for you.

Q And if I decided to sell it today or tomorrow, it could be done the same way? A That is right.

Q Is that a general practice in the city of Washington, as far as you know? A As far as I know it is a general practice not only here but in any part of the country where I have ever had any occasion to do any business.

Q Now, getting back now; was there anything else that transpired at the meeting you had with Mr. Johnston, in his private office, on this occasion when you discussed the Barium Stainless Steel Corporation matter? A Maybe you had better give me that question again.

Q Was anything further said at that time with relation to that matter when you discussed it in his private office with him, with Mr. Johnston? A I don't recall that there was any specific reference, except that he said that I should continue as I had in the past; that I was familiar with the company from previous experience; that I knew what I

53 was trying to accomplish, and since what I was trying to accomplish would be of some direct interest to his firm—that they had also sold the stock previously—he would be very happy to cooperate and help in any way he could to work out something that would help the Barium Company; but since I was familiar with it, to proceed just as I had before, and do whatever I could to bring it to a successful completion, in whatever manner it could be. I told him I didn't know whether we would be financing or borrowing or merging or leasing the Barium Company, but Barium had to do something, and I hoped to be the one to do it, since that is the way I make a living.

Q What, if anything, was said about the financing of expenses in connection with your efforts along that line? A Johnston said it would be borne by his firm from that day on, any out-of-pocket expense.

Q And it was? A It was.

Q Tell us what the situation was regarding Barium Stainless Steel Corporation at that time, and if you need to, you can tell us a little of the history prior to that time in

order to bring us up to it. A I will start in 1936 and try to cover it as briefly as possible.

The first public offering of Barium Stainless Steel was made by J. A. Sisto & Company in 1936.

Q Who is J. A. Sisto & Company A J. A. Sisto
54 & Company at that time were members of the New York Stock Exchange and were specialists in underwriting issues. They had no retail department whatever. They were wholesale brokers. The Barium issue was going into registration, my recollection is, in August 1936.

Q When you say "going into registration," what do you mean by that? A That means it was being filed with the Securities and Exchange Commission in Washington, D.C. to qualify for sale to the public.

Q Does it have to meet with the approval of the S. E. C. before it could be issued? A We won't say it had to meet with the approval. We will say that it had to get clear of any disapproval with the S. E. C. They don't approve any securities.

Q Proceed, then. A I went to New York and I was introduced to Mr. Sisto through the syndicate manager of another house. The house of Hammonds & Company, of New York. We had represented that firm in several underwritings. They were sufficiently satisfied with the results that we had for them; that they recommended us to Mr. Sisto.

Mr. Sisto had prior issue in underwriting in the country before Barium and he did not sell any of the stock in Washington, and he wanted to meet that market, so that is
55 why he was interested in talking to me. I was, of course, speaking for my firm, Mayhew & Reily, and I was the one who went to see Mr. Sisto.

I made an agreement with him to wholesale the stock in the District of Columbia, in Virginia, and in Maryland. I may be wrong about Maryland at that time, although I did

cover Maryland for him later. The District of Columbia and Virginia, in any event, and he asked us approximately how many shares I thought we could sell, and I said I thought we could sell 25,000 shares, and he didn't believe me, but we finally agreed that he would protect me on that figure and we came back and went to work to sell the stock; and it was offered officially in the latter part of September 1936.

Johnston, Lemon & Company subscribed to 10,000 shares of that stock.

Q When you say "offered", offered by whom? A Offered by J. A. Sisto & Company, the underwriters, in behalf of the Barium Steel Corporation.

Q And through whom in this jurisdiction? A In this jurisdiction there were a number of dealers that retailed the stock to their customers, of which Johnston, Lemon & Company was one, and they took the largest individual amount in this territory—10,000 shares.

Q All right; proceed. A Then I think it was
56 some time in the following year the company was again in some financial difficulty, and they attempted to make a loan from the Reconstruction Finance Corporation, and that took quite a long number of months to work out, but they finally—they had requested a \$200,000 loan. They were finally told that if they could and would provide \$50,000 of permanent capital, new capital, into the Barium Corporation treasury, that the R.F.C. would loan them \$150,000. So the company was faced with raising \$50,000 first from private sources, and Mr. Johnston and his partners were interested in helping in that matter and discussed it both with me and with Mr. Sisto.

Q You say Mr. Johnston. Is that Mr. Johnston of Johnston & Lemon. A Yes, sir; Mr. James M. Johnston. In any event, just how it worked out or how much Mr. Johnston had to do with anything, I don't know, but they did qualify for the loan through the sale of \$50,000 worth of shares to a Chicago corporation.

Q How long was that before you went with the corporation of Johnston, Lemon & Company? A That was before. Then it was the following year, in other words, 1939, that Barium defaulted in their Reconstruction Finance Corporation loan, defaulted both in principal payment
57 and interest payment. That was when I again began to try to find financial relief for the Barium Company. In 1939. I think I started about June of 1939. I tried to arrange an industrial loan, that is, a commercial loan for the company based on a first mortgage in an amount that would enable the company to pay off the R.F.C. and have some additional capital, and I couldn't do that.

In September, Mr. Hitler invaded Poland, and that had quite a bearing on the outlook for what steel companies might face, and the Barium property became substantially more valuable with the prospect of a war developing. Barium's plant is eight acres under roof. That is quite a large plant.

Q What do you mean by that? A I mean the total building area covering facilities is eight acres. It had some very valuable equipment and needed a good deal more equipment.

I went to Mr. Milburn then. I have known Mr. Milburn for many years, but at that time I went to him because I knew he had wide connections in the steel industry, and after quite a number of meetings I persuaded him to try to find someone to solve the Barium problem for me and with me.

Q Who was Mr. Milburn? Tell us something about him.

A I am sorry; I didn't understand you.

Q You said he had interests in the steel industry. What type of business was he in? A Primarily when I
58 first knew him, his father was with the firm of Milburn, Heister & Company. He was an architect. After his father died, he continued that company for a short time, and then he went into steel construction.

He represented Marion Flood of New York, which was a large engineering firm. He represented Aetna Standard Engineering, in due course, and Continental in Alabama.

In other words, he is an engineering and sales engineering specialist, in my opinion.

Q And you say that you contacted him? A I contacted him and had his support, and he undertook to interest various people that he thought might be available to solve the Barium problem, either by merger or lease or new funds, or something of that character.

Q That is, the Barium's financial problem? A That is right.

Q What about this loan they had obtained from the R.F.C.? What was the status of that? A That loan was in default both as to principal payments and interest payments.

Q Does that bring us up to the time when you got into the firm of Johnston, Lemon & Company? A Well, I went to Mr. Milburn, I think it was the 3rd of September, 1939, and I went to work for Johnston, Lemon & Company approximately November 1, 1939. I don't remember
59 the exact date. Either November 1 or November 15.

Q These things that you had done prior to the time you went with Johnston-Lemon, what further did you do after you had spoken to Mr. Johnston and reached the agreement you just stated? A After Mr. Johnston told me to proceed along the same lines that I had prior to my connection with his firm, I did just that. I continued with Mr. Milburn to seek—the most promising situation we developed about that time was to merge the company with another company. The other company was the Aetna Standard Engineering Company.

Q Where are they located? A In Warren, Ohio, and Massilon, Ohio.

Q Where is the Barium Stainless Steel Corporation? A Canton, Ohio.

Q Tell us what was done. A Aetna is in Warren, Pennsylvania, and Massillon, Ohio. I am sorry.

It took quite some time to try to work out a merger of the two companies, and ultimately it was abandoned, largely because one of the officials of Aetna Standard Engineering, who was interested in that merger, left the employ of Aetna Standard Engineering, and he was Mr. Bert Bowman of the Engineering firm of Griffiths-Bowman & Company, and then Mr. Bowman and his associates formed or proposed to form a company to be known as International Steel
60 Corporation. That proposal was that they would lease the Barium plant for a period of one year, during which time they would try to arrange to secure the necessary capital to buy the property.

After quite some negotiations with them, they proposed a lease. The lease was drawn, it was brought back to Washington, to Milburn, and we discussed it in some detail here, meeting with Mr. Johnston, and I took that lease to New York to Mr. Sisto, and before, however, discussing the lease in any detail with him, I arranged for Mr. Sisto to address a letter to my firm, Johnston, Lemon & Company, in which he agreed as president of the Barium Stainless Steel Corporation to pay to my firm a commission or a fee in the event the property was leased; that they made a lease and received rental, why, we would receive a compensation for that.

That letter was, of course, addressed to Johnston, Lemon & Company, and protected them on profit even if the property was just leased.

MR. OFFUTT: Would you mind marking this letter, please, Mr. Clerk?

And also this letter (indicating).

(Letter, dated 3/5/40, Sisto to Johnston, Lemon & Company,

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was marked Plaintiff's Exhibit No. 1 for identification.) (Letter, dated 2/28/40, Johnston, Lemon & Company (By Gram) to Sisto, was marked Plaintiff's Exhibit No. 2 for identification.)

MR. OFFUTT: I think we can save a little time, your Honor, by proceeding another way.

MR. TOWERS: I might say, your Honor, that if that be a copy of a letter that is admissible in evidence, I of course have no objection to it. It is an unsigned typewritten paper. It isn't a copy of anything. It is an original typewritten paper, the source of which I know nothing about, and I am perfectly willing that everything should go in.

THE COURT: Why don't we proceed as we usually would do, and interrogate the witness about it before I admit it, and then you can examine him, if you wish, on cross, before I rule on the admission of it, if it is offered.

MR. OFFUTT: Fine.

BY MR. OFFUTT:

Q I show you Plaintiff's Exhibit No. 1 for identification, a letter dated March 5, 1940. A That is a copy of the letter that I had Mr. Sisto write to Johnston, Lemon & Company, at the time I went to him with the lease proposal for the Barium property.

Q Who signed that portion written in ink? A That is signed by J. A. Sisto in my presence. I had him sign that copy for me. The original I delivered to Mr. James M. Johnston, in his own office.

62

Q What was your purpose in getting this signed and sent to the Johnston-Lemon Company? A The

purpose was obviously to protect my firm so they would get some remuneration for the time that I put in on it as their employee, and the time that they spent in paying my expenses while I was attempting to make this arrangement.

MR. OFFUTT: I offer that letter in evidence, your Honor.

THE COURT: All right.

You may examine him, if you wish, touching the letter, before I rule on the admissibility of it, Mr. Towers.

MR. TOWERS: This is not the letter I had seen, your Honor. This is a different letter.

THE COURT: Well, let's go about this one, since it is the one we are talking about, and then we will take up the other one.

MR. TOWERS: If the Court please, may I interrogate the witness?

THE COURT: Yes, on the admission of this document.

MR. TOWERS: Yes.

BY MR. TOWERS:

Q Mr. Reily, does that letter have anything to do with the 1941 underwriting in connection with which it is involved in this suit? A As far as I know it has no
63 direct connection with any underwriting at all, and—

Q Doesn't this letter say—

MR. OFFUTT (interposing): Just a minute. Let him finish the answer. I object, your Honor.

THE COURT: Let the reporter read the answer so far.

THE REPORTER (reading):

“Answer: As far as I know it has no direct connection with any underwriting at all, and—”

THE COURT: Is there any further part of your answer?

THE WITNESS: If you please,

THE COURT: Go ahead and state it.

THE WITNESS: It was only done to protect the firm of Johnston, Lemon & Company, in the event any property was leased, and any action I took was always in their name and with the idea of protecting them, because that is where my interest came from, I had a contract with Johnston-Lemon.

BY MR. TOWERS:

Q Doesn't this letter relate to a sale or lease of Barium? A possible sale or lease of Barium? A It relates primarily to the lease of the Barium property with the ultimate intent of completing a sale.

Q And was such a lease or sale either ever consummated? A No.

64 Q Did this transaction, which did not take place, have anything to do with the later issuance of stock by Barium which is involved in this suit? A The only relationship it had to the issuance was that if this had gone through there would have been an issuance of stock in the form that Johnston, Lemon and Company eventually got into.

MR. TOWERS: Your Honor, I don't believe this material is admissible.

THE COURT: Well, I would suppose that certainly from the statement made by counsel, that the object here is to show what the relationship of the parties were and the various facts and circumstances under which they came

together and what they did, to see whether or not out of it all arises either an expressed, oral or implied agreement about the sale. This is not dispositive of the case, but I think just as other matters that have happened and have been talked about are to be brought before the jury, that correspondence on this part is pertinent to that extent. What weight it should have is to be given by the jury.

MR. TOWERS: May I say one word further, your Honor?

THE COURT: Yes.

MR. TOWERS: Your Honor hasn't seen this letter. It is not signed by the defendant. It purports to be signed by the Barium Stainless Steel Corporation.

65 THE COURT: It is addressed to the defendant, isn't it?

MR. TOWERS: Yes, sir, and it says what the Barium Company would do if a transaction were consummated, and that transaction was never consummated.

THE COURT: Yes, I understand the point you are making and it goes very much to the weight of it, but as far as its pertinence, I think it is simply one of the things that was alleged to have taken place between the parties with such light as it may give to the jury.

I think I will let it be admitted.

MR. TOWERS: Very well, Your Honor.

THE COURT: What is the date of it?

MR. OFFUTT: March 5, 1940, Your Honor.

THE COURT: All right. Let it be admitted and mark it Plaintiff's Exhibit No. 1.

(Document heretofore marked Plaintiff's Exhibit No. 1 for identifica-

tion was thereupon received in evidence.)

MR. TOWERS: For purposes of the records, may my objection, purely for formal purposes, be noted?

THE COURT: Oh, surely, your objection is noted and an exception to my ruling is noted.

MR. TOWERS: Yes.

BY MR. OFFUTT:

Q Now I show you Plaintiff's Exhibit No. 2 and ask you what this is (indicating)? A It is a letter
66 dated February 28, 1940, or a copy of a letter dated February 28, 1940.

THE COURT: Is it a letter or a copy?

THE WITNESS: It is a copy of a letter addressed to J. A. Sisto, Chairman of the Board, Barium Stainless Steel Corporation.

THE COURT: Who does this purport to come from? Let's give a description of it.

THE WITNESS: It is signed or the indicated signature is Harvey B. Gram, Jr. who is a partner of Johnston, Lemon & Company, and was Sales Manager while I was employed there.

BY MR. OFFUTT:

Q Do you know whether the original of that letter was ever sent? A The original of that letter was sent and it was sent for a specific purpose.

Q What was the purpose? A The purpose was to put on record in the files—

MR. TOWERS: Just a moment. Your Honor, I believe the parol evidence rule applies here.

THE COURT: I think you are right. I think the objection is well taken.

Don't state the contents of the letter. If you offer it in evidence, we will see if there is an objection. If you wish to interrogate him, you may, Mr. Towers.

67 MR. OFFUTT: I offer it in evidence, your Honor.

* * * * *

A It is an original typewritten paper.

Q It is not a copy? A I am sure it isn't. It is marked "Copy" but I am sure it was copied separately as an original.

Q Did you see Mr. Gram sign it? His name isn't on it.
A Well, I was with him when he dictated the letter and discussed with him the purpose that the letter was to accomplish, and he dictated it, I didn't and I assume it went out in the due course of business since he gave me that copy for my files.

* * * * *

68 THE COURT: Suppose we admit it with the right to move to strike, if, after investigation, you bring to me information which makes it appear it should not have been admitted.

* * * * *

THE COURT: Let it be admitted subject to such a motion, and mark it "Plaintiff's Exhibit No. 2".

(Document marked Plaintiff's Exhibit No. 2 was thereupon received in evidence.)

* * * * *

MR. OFFUTT: Plaintiff's Exhibit No. 1, a letter dated March 5, 1940, reads as follows:

"Johnston, Lemon & Company
Southern Building
Washington, D. C.

"Gentlemen:

"This will confirm our understanding that for and in consideration of your efforts to negotiate and arrange for the completion of certain transactions with Messrs. K. Bert Bowman, Fred Griffiths and/or E. E. Schwartzswelter, either as individuals or with any corporation with whom they may be connected, looking towards the sale or lease of the assets and/or plant of the undersigned, that, in
69 the event of the successful confirmation of either event, the undersigned will pay to you for and in consideration of such services either—

(a) Five percent of all the stock which may be received by the undersigned in consideration of the sale of its assets or

"(b) in the event that it should lease its plant for a period longer than three (3) months, five percent of the rental which may be received therefor, such five percent to be payable on or before ten (10) days after receipt of such rental, whether paid in monthly installments or otherwise, during the life of said lease or any renewal thereof."

"Yours very truly,

"BARIUM STAINLESS STEEL CORP.

"By: J. A. Sisto, President"

Plaintiff's Exhibit No. 2, a copy, an original typed copy of a letter dated February 28, 1940, reads as follows:

"Mr. J. A. Sisto, Chairman of the Board

Barium Stainless Steel

68 Wall Street,

New York City, New York

"Dear Mr. Sisto:

"Phil Reily has just discussed with us the conference which he and Mr. Milburn had with you in New York yesterday regarding the proposition on the Barium Stainless Steel.

70 "Phil has been spending a great deal of time on this situation for the past several months and we are delighted to know that the prospects are so favorable for working out a satisfactory deal for Barium."

"Yours very truly,

"JOHNSTON, LEMON & COMPANY

By:

"Harvey B. Gram, Jr."

The letter is unsigned.

BY MR. OFFUTT:

Q Now, what conference was referred to in this letter dated February 28, 1940, that you refer to?

MR. TOWERS: Just a moment. May I see that letter please?

(The letter was handed to Mr. Towers)

• MR. TOWERS: I think he can answer that.

MR. OFFUTT: All right.

THE WITNESS: That was the conference which I had with Mr. Sisto in which I told him of the progress that

we then felt was being made toward a merger of Barium Stainless Steel with Edmonds Engineering Corporation.

BY MR. OFFUTT:

Q When you would go up to New York or any of these places where you would go in connection with this matter, how would you get your money to pay for those trips? A

I would go to the cage or what you would call the
71 cashier, of Johnston, Lemon & Company, and draw an amount of money that I thought would be adequate to cover the trip. Upon my return I would turn in any money that I had not spent and give an accounting of what I had spent. If I had spent more than the money I originally drew, they always gave me whatever the additional amount was.

Q Was there any written memorandum made about those expenditures? A I turned in little expense vouchers, in which I itemized under three headings what my expenditures were.

Q Would it show in connection with what the expenses were given or paid? A Oh, yes.

Q Was that true on each occasion that you would spend any money in connection with this Barium Stainless Steel matter. A Well, any occasion where I went out of the city, where railroad fares or hotels were involved.

Q Mr. Milburn was with you at the time you said? A That is right.

Q Who paid his expenses? A He paid his own expenses.

Q Now, what happened after that, what other efforts were made? A Well, do you mean after the date of this letter in regard to the lease?

72 Q That is right. A We were unable to bring completion of that lease proposal into operation for various reasons that I can't recall now in detail. In other words, it was not carried to completion, and we then en-

deavored to follow one of our other leads still seeking to solve the same problem which was to get Barium Stainless Steel Corporation out of financial trouble.

Q Did I ask you how Mr. Milburn got into this matter? That is, did he get into it through your efforts or the efforts of someone else? A He got in it through my efforts, alone.

Q What other plan was worked out and what did you do in furtherance of any other plans? A Well, the first thing that we did then in trying to fit the company for financing was to go to Mr. Sisto. That is, Mr. Milburn and I went to Mr. Sisto and told him very plainly and very frankly that we had become convinced that we could not accomplish any financing for his company as long as it had the management it then had. It wasn't a very pleasing revelation to Mr. Sisto since he was the corporation's highest officer. And we demanded his removal if he wanted us to continue to try to finance his company or work out its problem in any way.

He finally did, however, agree that he would remove himself from an official capacity with Barium and also
73 take with him two directors who were on the Board for him, and thereby create vacancies on the board which we would have the right to fill.

Q When you say, "we" who are you referring to? A Mr. Milburn and I.

Q And who were the other directors—do you know? A Mr. Norsworthy, who prior to that time, was employed by Mr. Sisto in his own New York brokerage office, and the other man was, William Rhinelanders Stewart, a well known New Yorker.

Q Can you tell us the amount of stock or approximately the amount of stock that Mr. Sisto had in the corporation? A The time we are speaking of now he held to the best of my recollection, approximately 123,000 shares of stock.

Q And what proportion of the stock of the corporation was that? A My recollection is that at that time the corporation had outstanding less than 500,000 shares.

Q Could you say whether or not he was one of the largest single stockholders? A As far as I know he has always been the largest individual stockholder in Barium.

Q What was done then, after that time, to remedy this matter of the directorate for the setup that you said you wanted to correct? A Mr. Sisto, of course, demanded who we expected to place in his position in
74 the company; in other words, to hold the highest office in the company and we told him that we hoped to induce Admiral Charles Conard to accept that position with the firm.

THE COURT: How do you spell his name? It has been pronounced differently by several people, so let's get it straight.

THE WITNESS: Your Honor, it is C-o-n-a-r-d.

BY MR. OFFUTT:

Q Was the Admiral active in the Navy then or was he retired. A He had then been retired.

Q Do you know what position he held in the Navy when he was in there. A I know the position but I can't think of the proper title for it right now.

Q Tell us what was done, then, toward getting these men. A We came back to Washington and we did succeed in getting Admiral Conard to go on the Board of Directors of Barium. It left two vacancies on the board at that time which we hoped to use when we were able to complete some financing.

Q About how many people were on the Board of Directors; can you give us some idea? A My recollection is that at that time there were seven.
75

Q About when was this conference you had with Mr. Sisto, this last conference you referred to, when following that conference you came back to Washington? A I think it was in either April or early May 1940.

Q Were any written contracts drawn up following those conferences? A No.

Q I mean between the Barium and the members of the prospective board? A No contracts at all that I know of.

Q By the way, up to this time had Mr. Johnston of Johnston, Lemon and Company ever been in on any of these conferences with you and Mr. Milburn in an effort to help out the Barium Steel Corporation? A None in which I was present.

Q Did you from time to time discuss the matter with him, the progress of it? A Certainly.

Q Did you discuss it with any members who were of the firm of Johnston, Lemon and Company? A I am sure Mr. Gram was kept very thoroughly posted on whatever I was doing.

Q Did they make any suggestions about what you should do or leave that entirely up to you? A
76 They left it almost entirely up to me. Rather, they left it up more to Mr. Milburn, I think; the two of us.

Q Tell us what happened after that. A Well, after we succeeded in getting Admiral Conard on the board, we then continued to try to work out a program with Mr. Griffiths and Mr. Bowman, of the Griffiths-Bowman & Company, Consulting Engineers. The main project at the time involved participation in the undertaking by the Copperweld Steel Corporation.

Q And where are they located? A I am not sure, Mr. Offutt, they are in Ohio.

Q Somewhere in Ohio? A Yes.

Q What else was done? A While we were in that negotiation with "Griffiths-Bowman," and "Copperweld Steel Corporation," Mr. Sisto called me on the long distance telephone and told me that he had interested to a good extent a banking house in New York to undertake to sell stock for the Barium Company, and that if I would

cooperate and persuade Mr. Milburn and Admiral Conard to cooperate, that he was sure that he could complete a deal to sell a specified number of shares of stock and provide the company with ample capital.

Q And where did he call you? A He called me
77 at the office of Johnston, Lemon & Company.

Q And what if anything did you do following that conversation with him. A Well, I immediately went to Mr. Milburn to find out how quickly he could arrange to go to New York with me for the conference that Mr. Sisto wanted us to attend, and to find out what it was that he wanted us to do to complete the new financing program.

Q And did you go to New York following that conference with Mr. Milburn? A We did. Mr. Milburn and I went to New York.

Q About what time was that? A My recollection is that it was the first week of October 1940.

Q What was done when you got to New York regarding this matter? A Well first, of course, Mr. Sisto did not disclose to Mr. Milburn or me the name of the firm he was trying to negotiate the transaction with. He told us that the firm felt that the progress we had made up to that point in getting a voluntary reorganization of the management was constructive and he wanted to be sure that Admiral Conard would stay on the board of the Barium Stainless

Steel Corporation and would sign a contract to do
78 that, and that Mr. Milburn would sign a contract to represent the company as vice president in charge of sales, particularly with government contractual work in mind, and the third vacancy on the board would be filled by the new firm. It still was undisclosed to us until we could ascertain whether Admiral Conard would go on the board.

Q When you say the new firm, you mean the firm that was going to underwrite them. A That is right.

Q Was any discussion had as to whether or not they would underwrite it if these two men wouldn't serve? A Mr. Sisto simply told us that they had made it a condition

of their interest, that these men identify themselves with the corporation under contracts for a fixed period of time.

Q And were those contracts drawn up and submitted to both Milburn and— A Not at that time.

Q I mean later? A They were later. At the meeting we are now discussing Admiral Conard wasn't present and Mr. Milburn had to return to Washington and discuss the proposal with Admiral Conard.

Q Was Mr. Milburn present at the discussion between you and Mr. Sisto? A Oh yes.

Q Did anything further happen at that conference? A At that time, I of course was thinking of myself and
79 Johnston, Lemon & Company. I asked Mr. Sisto what provision would be made to take care of me, of the work that I had done over the preceding twelve months or more, for Johnston, Lemon & Company, and he told me then in Mr. Milburn's presence that he would insist that the firm that he was negotiating with would permit my firm to participate in that business if they desired to do so.

Q Now, following that conference did you see Rear Admiral Conard? A When we came back to Washington, I was not present when Mr. Milburn talked with Admiral Conard. Mr. Milburn's business associate is the son-in-law of Admiral Conard and therefore Mr. Milburn and the Admiral are very well acquainted and have been over many years. Mr. Milburn did advise me that subject to certain conditions of remuneration, that the Admiral would serve or continue to serve Barium and would contract himself to serve them. He was on the Board of Barium at that time but he had no contract.

Q So that before entering into the contract these conditions were to be met and then the contract would be executed by Mr. Milburn and Rear Admiral Conard? A That is right.

Q Was there any further meeting? What was done after that? A As soon as it was ascertained that Admiral Conard would serve and that Mr. Milburn

80 would serve, an appointment was made, my recollection is, directly by Mr. Sisto himself to meet at the office of Tobey & Company, Tobey & Company then being disclosed as the firm that would—that Mr. Sisto was dealing with, at which time Mr. Milburn, Admiral Conard, Mr. Johnston, or any other member of his firm, should meet and wind it up; complete the transaction.

Q And was such a meeting held? A That meeting was scheduled and held.

Q And when was it set for and what occurred? A My recollection is that it was set for the 17th of October, 1940. Mr. Milburn and I went to New York on the train. The meeting was scheduled for the afternoon of the 17th. Mr. Milburn and I went up on the train. Mr. Johnston was in Boston and came down from Boston to attend the meeting and met us at the office of Tobey & Company.

Q Do you know how Mr. Johnston happened to come there on that occasion? A He came there after I made the appointment for him after discussing it with him and ascertaining that he did want to participate in the new financing for Barium and he made the appointment. It was agreeable to him so we set that date.

Q Tell us who was at that meeting, where it was held, and then tell us what occurred. A I can't name every-

81 I can. Mr. Johnston, Mr. Milburn and I were there from Washington. Mr. Randolph Eberstadt, whom

I believe was the senior partner of Tobey & Company was of course present with several other associates. I think there were about seven or eight people all told in the meeting.

Q Tell us what happened at that time. A Well Mr. Milburn and I arrived there ahead of Mr. Johnston. Mr. Eberstadt received us and we naturally discussed some of the points of the proposed business with Barium, and Mr. Milburn and Mr. Eberstadt were having a conversation which particularly impressed itself upon my mind because

Mr. Milburn made some comment about the numerous trips he had made back and forth to New York and other places in behalf of Barium, and he didn't know now that there was something pretty definite arranged in the financing why he had to be present. Mr. Eberstadt said that unless he and Admiral Conard were there to commit themselves to serve the corporation, that he was not sure that he would go through with the project at all. So that it was very essential for Mr. Milburn to be present and he attended the meetings at all times when I was there.

Q I think you said Admiral Conard was not there? A Admiral Conard was not there.

Q Who was there to represent him? A Mr. Milburn.

Q Have you told us everything that happened at that meeting? A Well, the thing of greatest importance to me that happened at the meeting was that when Mr.

82 Eberstadt, the senior partner of Tobey & Company was satisfied that Admiral Conard and Mr. Tobey would sign contracts, to finance the corporation, he was satisfied to go forward with the financing and he turned to Mr. Johnston and asked what participation he felt that he should have to reward him for the contributions that had been made by his firm. That contribution was made by me and that was the first meeting in connection with the Barium transactions, any of them, that Mr. Johnston had ever attended. The business was ready to complete and he attended them.

Q Was anything said there as to how much was to be paid Johnston, Lemon & Company? A Mr. Johnston said that he felt that his firm should have twenty percent of the underwriting and that was immediately accepted by Tobey & Company through Mr. Eberstadt. There was no discussion about it at all.

Q Is there anything else that had to do with this transaction that occurred at that meeting other than what you have said? A Well, I think it is important in my claim here to point out that when that meeting was over, Mr.

Milburn, Mr. Johnston and I left the office of Tobey & Company together, the three of us. No other party was present. Both Mr. Milburn and I asked Mr. Johnston if he was pleased and satisfied with the way the long drawn out struggle with the Barium situation had finally ended up, 83 and he expressed himself he was very happy that there was something definite and tangible to be done forth with, and the problems of Barium would be settled and was of considerable importance to him and to their clients that held stock and he was generally very satisfied with what had taken place. And he expressed himself so.

Q Did you return to Washington together, you, Mr. Johnston and Mr. Milburn? A Mr. Milburn and I returned to Washington by train and Mr. Johnston flew to Washington.

Q Following that trip to New York that you had just described, did there come a time when the prospectus was issued for the Barium Stainless Steel Corporation? A Yes.

MR. OFFUTT: Mark this please for identification as Plaintiff's Exhibit No. 3.

(Document entitled "Prospectus, Barium Stainless Steel Corporation", was marked Plaintiff's Exhibit No. 3 for identification).

BY MR. OFFUTT:

Q I show you this which is marked Plaintiff's Exhibit No. 3 for identification and ask you what that is. A That is an official copy of the prospectus prescribing the offering of the Barium Stainless Steel stock.

I think it is dated January 2, 1941. Yes, down here it is at the bottom dated January 2, 1941. The public offering was made January 6, 1941.

84 Q That was issued on January 2, 1941? A Be-
came effective then.

Q And then the public offering was made January 6,
1941? A That is right.

MR. OFFUTT: If your Honor, please, I offer this
prospectus in evidence.

THE COURT: Any objection?

MR. TOWERS: No objection, Sir. We offered it at
the pretrail, as a matter of fact.

THE COURT: Let it be admitted.

(Document marked Plaintiff's Ex-
hibit No. 3 for identification was
thereupon received and evi-
denced.)

THE COURT: Are you going to read it all to the
jury?

MR. OFFUTT: No, Your Honor. I just marked it in
several places.

THE COURT: All right. You read whatever is of in-
terest to you and opposing counsel can supplement it with
anything he thinks should be brought out.

MR. OFFUTT: On page six, under the heading "Man-
agement" it reads as follows:

"Charles Conard, Chairman of the Board, Rear Admiral
Retired, United States Navy. Formerly Paymaster Gen-
eral, Chief of Bureau of Supplies and Accounts of the
United States Navy. He was also Administrator of
85 Customs and Financial Adviser, Republic of Haiti,
1915-16."

Then the third paragraph reads as follows:

"T. Yancey Milburn, Vice-President. Consulting Engi-
neer, Barr Building, Washington, D. C. President of Mil-

burn and Brady, Inc. Industrial Engineers. Previously served in executive capacity in sales engineering with James Stewart & Company, of New York City, Murray & Flood Inc. of New York City, International Engineers, and was Consulting Engineer for Hydro-Electric Power Company of Wisconsin".

Then under the heading of "Directors and Officers":

"Directors and Officers of the Company are as follows:

Charles Conard, 2310 California Ave. N.W., Washington, D. C. Chairman of the Board of Directors.

T. Yancey Milburn, Barr Building, Washington, D. C. Vice-Pres. & Director"

and there are several other persons names some seven or eight names, who represent the directors.

Then on page 7 of the prospectus the fourth paragraph on the top:

"The Corporation has been informed by the Underwriters that they have agreed with Messrs. T. Yancey Milburn, Jule R. Breuchaud and Admiral Charles Conard that, if each of them serve as a Director of the Corporation for one year from the effective date of this registration statement, Tobey and Company will grant them the right to purchase 5,000 shares each of Common Stock of the Corporation out of the 122,600 shares which Tobey & Company are granted the right to purchase under the terms of the underwriting agreement dated October 4, 1940, when, as and if such options accrue to Tobey & Company, at the same price as they accrue to Tobey & Company, that is, \$1.50 per share. It has also been agreed by Tobey & Company that the first 15,000 shares (after the 5,000 shares which Tobey & Company are reserving for another purpose, for the details of which see below under the subsection entitled "Details of Offering") which they are granted the right to purchase will be covered by the agreements,

and, in the event that options accrue (after the 5,000 shares mentioned above) as to less than 15,000 shares, they are to be equally distributed among Mr. Milburn, Mr. Breuchaud and Admiral Conard.”

Then on page 10 of the prospectus of the third paragraph from the top:

“Tobey & Company entered a contract with Johnston, Lemon & Company, of Washington, D. C. dated November 2, 1940, under which the latter had been granted the right to offer the stock. They will participate in the net profits of the underwriting after the deduction of the expenses in connection therewith and of the finder’s fees referred to below, to the extent of 20%. The determination of the existence and amount of such net profits is to be by Tobey & Company and their determination is conclusive.”

87 Then the next paragraph down reads:

“The Corporation is advised that the underwriter proposes to form a selling group in which it may participate and to the members of which it may allow the following concessions:

- (a) On stock selling from $1\frac{1}{4}$ to $1\frac{3}{8}$ inc..... $12\frac{1}{2}\phi$ Per Share
- (b) On stock selling from $1\frac{1}{2}$ to $1\frac{5}{8}$ inc..... $17\frac{1}{2}\phi$ Per Share
- (c) On stock selling from $1\frac{3}{4}$ to 2 inc..... $22\frac{1}{2}\phi$ Per Share
- (d) On stock selling from $2\frac{1}{8}$ to $2\frac{3}{8}$ inc..... $27\frac{1}{2}\phi$ Per Share
- (e) On stock selling from $2\frac{1}{2}$ and upwards, a minimum of $32\frac{1}{2}$ per share plus an additional 5 per cent per share for each $\frac{1}{8}$ th of a point that the market may be higher than $2\frac{1}{2}$ with the right to allow additional concessions in respect of initial commitments, volume sales, expenses and services in special instances.”

And then on page 15 of the prospectus the fourth paragraph:

“There have been recent changes in the management of the corporation. Messrs. J. A. Sisto, C. F. Norsworthy and W. R. Stewart, Directors, resigned and Messrs. Nelson

Gammons, Frank Huston and T. Yancey Milburn were elected to fill the vacancies caused thereby. The number of Directors were increased from five to seven and
 88 Messrs. Sam Tour and Jules R. Breuchard were elected to the Board. All of the new directors, with the exception of Mr. Milburn were suggested by Tobey & Company. Mr. Milburn was suggested by Johnston, Lemon & Company."

BY MR. OFFUTT:

Q In that paragraph where I have just referred
 89 to where it says, Mr. Milburn was suggested by the Johnston, Lemon & Company, do you know who suggested Mr. Milburn on behalf of Johnston, Lemon & Company? A I did.

Q At the time this prospectus came out or shortly thereafter, was anything done or said by Mr. Johnston reaffirming the original agreement that you had had with him? If so, tell us what it was. A It came about when Mr. Johnston advised me that Tobey & Company had set as a fee for wholesaling the stock three cents a share. That is the smallest commission rate that I had heard of to that time, or since, for that matter, and I remonstrated with Mr. Johnston that I didn't think it was reasonable to undertake to wholesale stock over wide territory on such a small remuneration. He said that that was the best arrangement that he could make with Mr. Eberstadt at that time, that if the stock went up in price, and they were sure that it would in due course, why the commission would be improved or raised. He pointed out to me that it shouldn't make any difference to me what the wholesale commission was since my interest was primarily in the underwriting profits, and used the expression that I could afford to sell the stock for nothing if the offering were completed successfully.

* * * * *

Q Were any further efforts made by you to sell
 90 any stocks wholesale or otherwise? A I had in-
 quired from several dealers in the South who were
 interested in selling the stock.

Mr. Gram instructed me—to use his words—I should
 “soft-pedal” the sale of the Barium stock, that they did
 not wish to sell in any volume until the price would reach a
 higher level, that the profit in the transaction was too small
 and they hoped the price to go up and give them a larger
 profit in it and in the meantime I should withhold my efforts
 to sell it.

* * * * *

94 THE COURT: No, he makes no claim in this
 case arising from the commission of sales of stocks
 which he made and wasn't paid.

MR. TOWERS: That is correct.

THE COURT: But his testimony is that the defend-
 ant stated to him that it made no difference whether he
 made any commission or not, because he was to share in
 the underwritings of it. Now, that may not be true, but that
 is his testimony and so it becomes relevant in the light of
 that testimony.

MR. TOWERS: Well, for what the letter may be
 worth, I have no objection.

THE COURT: Yes, I am not indicating any weight
 that should be given to it. I am only discussing the rele-
 vancy.

MR. OFFUTT: May I read the letter now, Your
 Honor, please?

THE COURT: Yes.

95 The letter will be admitted as Plaintiff's Exhibit
 No. 4.

(Letter marked Plaintiff's Exhibit No. 4 for identification was thereupon received in evidence).

MR. OFFUTT: This letter is on the letterhead of "Alester G. Furman Company, Greenville, South Carolina", dated October 9, 1940. Over to the right of the letter in the right hand top corner are the words: Stocks-Bonds

It reads as follows:

"Mr. Phil K. Reily
Johnston, Lemon & Company
Southern Building
Washington, D. C.

"Dear Mr. Reily:

"I have your letter of October 8 with reference to Barium Stainless Steel."

"I am delighted to know that there has been some action taken by the board with reference to raising money by selling 250,000 shares of treasury stock. If this stock is underwritten and re-offered in selling group basis, we should like an opportunity to go into it, not as principal underwriters, but in the selling group."

"I hope you will keep me informed as to developments from time to time."

"With kind personal regards, I am,

"Yours very truly,
/s/ Arthur C. McCall"

ACM:ee

BY MR. OFFUTT:

96 Q Who is Arthur C. McCall? A He is in the Securities Division of Alester G. Furman Company. They have several departments or divisions in their business.

Q Did you wholesale any stock to this company following this inquiry. A No sir.

Q And why not? A Well, they don't just come in and buy. You have to go and invite them and I wasn't allowed to go and invite them.

Q And was that because of the conversation you previously referred to with Mr. Gram. A That is right.

Q Just for the moment, before the thought escapes me all the efforts which you and Mr. Milburn had directed to the reorganization of the directorship and personnel of the management of the Barium Stainless Steel Corporation in removing Sisto and the other two members you referred to and substituted their own or appointing thereon Mr. Milburn and Rear Admiral Conard, can you tell us whether that was an important thing or not, that is, the change which was made? A You mean that change in management?

Q Yes. A It was so important that Tobey & Company stipulated that Milburn and Conard should sign contracts to bind them to serve the corporation.

97 THE COURT: Hasn't that already been gone over Mr. Offutt?

MR. OFFUTT: I think so, Your Honor.

THE COURT: I think it has been three or four times.

* * * * *

98 Q When did you learn that Johnston, Lemon & Company had received their stock in accordance with the agreement? A My recollection is that I first learned about it in either April or May, 1942.

Q And from whom? A I learned it from Mr. Milburn.

MR. OFFUTT: Mr. Clerk, mark this for identification, please, as Plaintiff's Exhibit No. 5.

(Document entitled, "Annual report Barium Stainless Steel Corporation, Canton, Ohio)" was marked Plaintiff's Exhibit No. 5 for identification).

BY MR. OFFUTT:

Q I show you this Plaintiff's Exhibit No. 5 and
99 ask you what that is? A That is the Annual Report of the Barium Stainless Steel Corporation, of the year ended December 31, 1941.

MR. OFFUTT: I offer this in evidence.

(The exhibit was handed to Mr. Towers).

BY MR. OFFUTT:

Q Where did you get this exhibit? A From Mr. Milburn.

MR. TOWERS: Your Honor, I believe this document is authentic. I have no objection to it.

THE COURT: All right, let it be admitted as Plaintiff's Exhibit No. 5.

(Document marked Plaintiff's Exhibit No. 5 for identification was thereupon received in evidence)

BY MR. OFFUTT:

Q You learned from Mr. Milburn of the stock having been issued? A Well, I learned from Mr. Milburn that settlement had been made with the underwriters and the underwriting contract terminated.

Q And then did you confirm that in any other way? A He sent me this copy of the Annual Report and it is so stated in this report.

Q Will you read the portion where it is stated? A The pages are not numbered. It is apparently on page 5, it is headed "Barium Stainless Steel Corporation, Canton, Ohio and addressed to:

100 "To the Stockholders of Barium Stainless Steel Corporation: and in the last paragraph of that page it states:

"On March 23, 1942, with the consent of the Underwriters of the Corporation, cancelled the underwriting contract with Tobey & Company and terminated all of the option rights of Tobey & Company and others. In consideration of services rendered to the Corporation by Tobey & Company and certain of its partners, from October 1940 to that date, of Tobey & Company's giving up the options which it had earned, which options extended for a period of years, and of its cancelling the underwriting agreement between it and the Corporation and giving up its rights thereunder to purchase additional stock and earn additional options, the Corporation issued to Tobey & Company, 40,000 shares of stock. In consideration of services rendered to the Corporation and of their giving up their option, the Corporation issued 1,750 shares each to Messrs. Breuchard, Conard and Milburn, and 2,500 shares to James H. Price & Company, Inc."

Q Now, when you learned of that, did there come a time when you told Mr. Johnston or anyone with the Johnston, Lemon and Company? A Yes. I of course went to see Mr. Johnston immediately.

Q And tell us what transpired? A Well, I reminded him that at the previous time I talked to him about the interest in the Barium Steel Corporation, that he had told me that there was no profit in it at that time. He was even dubious that there would ever be a profit; that if there was a profit, he didn't feel that there was any legal obligation on the part of his company and his partners to share it with me in any way; that if they gave me anything, they would do it because they were gen-

erous and big-hearted, and not because I had earned it. So I reminded him that this Annual Report indicated that the underwriting had proven to be profitable to the underwriters. I pointed out that the share that he would receive of 20 percent of approximately 40,000 shares of stock less certain percentage deduction for finders of Tobey & Company, that the dollar value there was rather substantial and there was a profit in the transaction after all, and I would like to have my share of it. He denied that I had any claim whatsoever to it, and since that time has stuck to that denial. That is why we are sitting here.

Q What did he say at the time? Can you recall what he said?

THE COURT: Can you recall anything that he said other than what you have already told us. Please don't go over the whole thing again.

THE WITNESS: Your Honor, if you please, the denial itself was the only important thing. He denied it.

THE COURT: He is asking you for anything else you have said that you haven't stated.

THE WITNESS: The only other thing that I can recall discussing with Mr. Johnston at that time was that I felt that I had put in a long term and honest effort on it; that I had devoted more time to the enterprise than anyone else; that I felt that I was very definitely and positively responsible for them being invited to participate in it, and that I felt that my claim was so solid that I intended to do everything that I could to collect it, and that I was going to the National Association of Securities Dealers Committee for our zone, which at that time was in Baltimore, and ask them to assist me in making my collection.

He said, well, I could do any—"so and so thing that I cared to do," and I did that.

BY MR. OFFUTT:

Q Has he ever compensated you in any way for the work you did? A He has never compensated me to one penny.

* * * * *

Q How familiar are you, if at all, with the Securities Act of 1933? A Well, I am not an expert on it, Mr. Towers.

Q Well, I didn't exactly ask you that question, Mr. Reily. I said, how familiar are you with it? A I would not know how to rate the degree of my familiarity to it.

Q Well, do you know, or not, that a registration statement is required under the law, under the Securities Act, to be accurate, and not to contain misleading statements? A Oh, yes.

Q And do you know also that it would be a violation of the Act if a material fact dealing with the issuance of securities were omitted from a registration statement? A Certainly.

MR. TOWERS: May I have Plaintiff's Exhibit 3?
(A document was handed to Mr. Towers.)

BY MR. TOWERS:

Q I should like to show you Plaintiff's Exhibit 3, Mr. Reily, which, as you will recall, is the prospectus that dealt with the 1941 issuance of shares of the Barium Stainless Steel Corporation in connection with which you claim in this suit a part of the underwriting profit. Now, are you familiar with that prospectus? A Yes.

Q You became so when you were dealing with this transaction, I suppose. A That is right.

Q Is your name mentioned in it anywhere? A It is not.

114 Q Do you know whether any finders are mentioned in this prospectus? A Finders are mentioned for Tobey & Company.

Q Finders for Tobey & Company? A That is right.

Q Perhaps I can help you to find the part that I am interested in.

Referring to page 11, Mr. Reily, of Plaintiff's Exhibit 3—and I would like you to follow me as I read it—

“Under the terms of the Underwriting Contract between the Corporation”—

now, that refers to Barium? A That is right.

Q —“and Tobey & Co., the latter”—that is Tobey & Company; is that correct? A That is right.

Q —“recognized James H. Shackleton, of 41 South Clinton Street, East Orange, New Jersey, and William Norins, of 123 East 37th Street, New York City, as finders, and agreed to pay them a finder's fee to be divided between them as they may agree, to the extent of twelve and one-half percent (12½%) of the net profit from the sale of the 250,000 shares of Common Stock, and also of twelve and one-half percent. (12½%) of the net profit on the
115 ultimate sale of the aforementioned optioned shares or of such portion thereof as the Underwriters may retain for themselves.”

Now, I take it that you were not a finder in this deal. A That is correct.

Q I take it that you were not, and you do not claim to be, a finder in this deal in so far as Johnston, Lemon are concerned. A I am not a finder as far as anyone is concerned.

Q In other words, it is not your claim, and I want to be very clear about this, because I want the jury to understand it—it is not your claim that you brought this deal to Johnston, Lemon & Company; is that correct? A I did not

bring it to them as a finder, Mr. Towers. I was employed by Johnston, Lemon & Company, and Johnston, Lemon & Company are mentioned in the prospectus. They would be mentioned in the prospectus not through me, but by the firm name.

If some other member of the firm had completed the arrangement to bring them into the business, that other person would not be mentioned by name, I do not believe. It would still be Johnston, Lemon & Company. I was employed by them. I am only in there in as much as I represented the firm. The firm of Johnston, Lemon and Company is not only mentioned, they were the underwriters.

Q Is it your claim that you are entitled to compensation that is involved in this litigation as a result of the fact that you brought this deal to Johnston, Lemon? A That is right.

* * * * *

A That conversation originally took place in what was then the Racquet Club and I believe is now known as the University Club on 16th Street in Washington.

Q "Originally took place"? A Yes, sir.

Q And who was present? A Mr. Johnston and Mr. Lemon.

Q Mr. Johnston and Mr. Lemon? A Yes.

Q Now, will you tell us the substance, to your best recollection, of what that conversation developed and disclosed? A Do you want me to review the cause of the meeting, that we had the meeting, and what transpired there? Is that what you want me to tell you? I think that was covered yesterday.

THE COURT: He has the right to interrogate you over again about it on cross-examination. A Yes; but do

you want a complete coverage of the meeting? Is that what you are asking me?

* * * * *

Q No; I am not interested in anything that went before or anything that went after; I want to know about this meeting, this particular meeting. A Well, they invited me to luncheon with them to discuss a business proposition and the luncheon was at the Racquet Club, and Mr. Johnston and Mr. Lemon sat down with me there over a luncheon and during the luncheon and after the luncheon told me of the proposed new syndicate in the Bank of America stock, to distribute stock held by the Trans-America Corporation, that they had been offered a territory comprising nine southern states in which they could have the distribution of that stock under the new syndicate. They named the new syndicate. If that is important, I will be glad to name it.

124 Q That is not important. A They told me that they had been offered 50 cents a share wholesale distribution in those nine States, that if I would be interested in coming to work for them for the purpose of wholesaling that stock in those nine States—and they told me why they invited me to come, because, first of all, I am a wholesale salesman and, secondly, I work in the South, not necessarily in all the nine States that they had, but in most of them—and that if I was interested in coming with them they would give me 50 percent of the profit accruing to them as distributors in those nine States, which meant to me that I would get 25 cents a share. That was pretty interesting to me. That is a very generous interest to me. I consider Bank of America good security.

Q So the jury may understand this point, the services which you may have rendered in that transaction are not

involved in this controversy; is that correct? A That is correct. That transaction never came about.

* * * * *

Q From your experience in the securities business, do you regard the distribution to a wholesale salesman by an underwriter of 50 percent of the wholesale profit, or underwriting profit, as being exceptionally high? A No; I think 50 percent is the usual amount, as far as my experience in the business goes.

Q Didn't you wholesale Barium stock for Sisto in '36? A Yes, sir.

Q And wasn't the wholesale commission 5 cents a share? A The wholesale commission was 10 cents a share.

Q Now, out of that—are you sure of that? A Very positive of it.

Q And out of that wholesale commission of 10 cents a share did you have any expenses to pay? A Well, we had the regular overhead of our office to pay, which would have been paid whether we wholesaled Barium or something else, or did not wholesale anything. We had no commissions to pay.

Q When you wholesaled Barium stock at 3 cents a share which, as I understand you did for Johnston— A That is right.

Q —you were under no expense; is that correct? 127 A That is right.

Q In other words, the firm bore the expense? A I assume they would have borne the expense. I did not have any in wholesaling Barium that I know of.

Q You had no overhead yourself? A That is right.

* * * * *

Q So that your statement is, your best recollection is that you brought Johnston, Lemon & Company into the '36 deal? A That is right, through Mayhew & Reily as distributors.

* * * * *

Q Now, I believe that you stated yesterday that you had done an awful lot of work for Barium and that you had attempted at one time to effect a merger as between the Barium Company and the Standard Aetna. A Aetna Standard Engineering Corporation; yes, sir.

Q What was the result of those efforts? A No transaction was completed with them.

Q You do not claim, then, that that work on your part conferred any benefit either upon the company or upon Johnston, Lemon & Company, do you? A It had an indirect benefit; yes.

Q To whom? A To the Barium Company and resulted in their ultimate underwriting in which Johnston, Lemon & Company participated.

Q But that was a service which you rendered to the Barium Company? A I was employed by the Johnston, Lemon & Company. I have never been employed by the Barium Company.

Q When was this merger to take place? A As soon as it could be consummated, if successful. It never took place.

Q Didn't you testify yesterday, Mr. Reily, that in point of time your efforts with respect to the engineering company merger with Barium came sometime before you had any connection with Johnston, Lemon? A Oh, no; no; that was after I became associated with Johnston, Lemon.

Q And you were trying to effect a merger? A Yes.

Q And the merger did not take place? A That is right.

Q Now, how about the leasing of the Barium plant? A
That was worked on after the merger with Aetna
131 Standard was abandoned, and with some of the same
principals that had been in the Aetna Standard negotiations.

Q What came of the lease? A Nothing.

Q Well, do you claim that those efforts on your part were beneficial to Barium? A I do not make any claim of having benefitted Barium at all.

Q Do you claim that they were beneficial to Johnston, Lemon? A I think all of the work that I put in at that time had its bearing on their participation in the ultimate financing.

Q Why? A By a natural chain of events which had to do with the change of management of the Barium Corporation, the strengthening of their personnel position, and the creation of more confidence on the part of the public in the new Barium management. I think all of those things contributed to the ultimate underwriting.

Q Now, Mr. Reily, what possible benefit could a merger that did not go through, and a lease that was not consummated,—what possible benefit could those have had upon an underwriting that took place sometime later? In other words, nothing was accomplished. What benefit? A
132 I am not in a position to judge, I guess, Mr. Towers.
It seemed to have a value to me. Maybe no one else recognizes it.

Q By the way, that lease was the proposed lease that never was negotiated with International Steel? A That is right.

Q You did not claim any compensation for these services; did you? A I provided compensation to Johnston, Lemon & Company in the event that any of those undertakings were completed.

Q But none was claimed? A That is right.

Q What other deals did you try to make for Barium, if any? A Well, we tried to get Copper-Weld Steel interested in Barium. That was in negotiation when Tobey & Company entered the picture in New York. We dropped our connection with Copper-Weld Steel for Tobey.

Q With the Copper-Weld Steel Corporation? A That is right.

Q That did not go through, as I understand it? A That is right.

Q The underwriters did not obtain any benefit as a result of that last proposal, did they? A Not that
133 I know of.

Q Nor the company? A I do not know anything about what the company did.

Q How about Admiral Conard and Mr. Milburn, about whom you testified yesterday? How did they get into the picture? A Primarily through my urging and my efforts.

Q Primarily through your urging? A That is right.

Q Well, I would like you to explain that a little more in detail. A Well, if I understand what you want to know, you want to know how I influenced them; is that what you mean?

Q Yes. A How did I succeed in doing it?

Q Yes. A Well, Mr. Milburn is a very close friend of mine, was at that time, and has remained so since. He is very well acquainted in the steel trade. It was a very natural place for me to go to try to find an interest that could be helpful to Barium Steel. Mr. Milburn has the confidence of a good many people in the steel industry. If he could be identified with the steel undertaking, it would influence certain people who are well acquainted with him. That was the primary object that I had in going to Mr. Milburn.

Now, Mr. Milburn and Admiral Conard were very
134 close friends and had been for a number of years.

Admiral Conard had been retired from the Navy, I think, a matter of about a year, or maybe a little less than a

year. He was a man that would like to have or wanted to have a reasonable amount of activity; he did not want to be just retired. So he was interested in an enterprise that provided some activity for him.

Mr. Milburn was able to influence him to become
135 interested in Barium.

Q Oh, Mr. Milburn got Conard? A That is right.

Q You did not get Admiral Conard? A Oh, no; I did not get him by the hand, or anything; no.

Q I do not mean that. Is it your testimony that as it were you set up a train of events? You knew Milburn, and you introduced him to Sisto; is that right? A That is right.

Q And then Sisto got Milburn to go on the board of Barium? A No.

Q What? A No, sir; that is not right.

Q That is not right? A That is not right.

Q What is right in that connection? Let us clear that up. A Mr. Milburn merely worked along to try to work out something for the Barium Company. He did not go on the board of Barium until after the transaction with Tobey & Company was consummated.

Q In other words, then, your testimony is that you persuaded Mr. Milburn to go on the board? A That
136 is right.

Q Is that correct? A I persuaded him to take an active interest in Barium. I did not care whether he went on the board or whether he became vice president or whether he just became a representative; as long as he was actively interested in it, I had accomplished a purpose.

Q Didn't you state in your testimony yesterday that Mr. Sisto, who, after all, was in charge of this deal, made it a condition of the underwriting that Milburn and Conard should go on the board of Barium? A That was not my testimony, Mr. Towers.

Q I see. Then I misunderstood.

Well, then, after Milburn went on the board, or became connected with Barium, how did Conard get in the deal?—Admiral Conard? A Admiral Conard was on the board of Barium Stainless Steel for some months before Mr. Milburn went on the board of Barium Stainless Steel.

Q Then it is not your testimony that you procured for Barium, or for Tobey, or for anyone else, the services of Admiral Conard? Is that correct? A It is my testimony that I was responsible for Admiral Conard becoming interested in the Barium Corporation through my efforts with

Mr. Milburn and our joint efforts with Admiral Conard.
137

Q In other words, you knew Milburn and knew Conard? A That is right. I met Admiral Conard through Milburn.

Q What importance, if any, do those matters have to your claim? A They have, in my opinion, considerable importance, since the services of those two men under contract was desired by Tobey & Company before they would proceed with the underwriting, and it was the use of that condition that enabled me to secure a fixed participation in the underwriting for my firm. I was then employed by Johnston, Lemon.

Q I thought you said yesterday that it was a condition. A It was a condition, but not by Mr. Sisto. You said by Mr. Sisto.

Q Very well. By whom? A Mr. Sisto stated that it was a condition by Tobey & Company, and that was later verified by Mr. Eberstadt.

Q Mr. Rudolph Eberstadt? A By Mr. Rudolph Eberstadt, senior partner of Tobey & Company.

Q And so you feel that you are entitled to compensation here because you got Milburn and Milburn got Conard, and they became connected with Barium; is that right? A

That is part of it, Mr. Towers. Do you want to pro-

138 ceed? That is just part of the chain. That brought Johnston, Lemon & Company into the underwriting.

Q Do you know that Mr. Sisto's deposition was taken?

A Yes; I do.

Q Do you know that Mr. Eberstadt's deposition was taken? A That is right; I know that.

Q Are you familiar with what they said? A Yes.

Q So far as you know did Mr. Sisto and Mr. Eberstadt have any interest in the outcome of this claim? A Any interest in the outcome of my claim?

Q Yes, sir. A None whatsoever.

Q Did you testify yesterday with respect to who Mr. Eberstadt is? If you did, we won't repeat it. A I think that I mentioned his catastrophe with Tobey & Company.

Q He is the principal partner of Tobey? A Well, he was the principal partner of Tobey & Company.

Q Yes, at this time. A That is right.

Q And Tobey & Company were, what did you say, the principal underwriters? A That is right.

139 Q And Johnston, Lemon & Company were also underwriter? A Also underwriter.

* * * * * * *

140 Q Now, as I understand, and I am all the way down to October 17, 1940, now, as I understand, on October 17, 1940, you testified that you and Mr. Milburn went to New York for a conference with whom? A With the members of Tobey & Company.

Q And that would be Eberstadt? A Mr. Eberstadt, primarily yes.

Q How about Sisto? Was he there? A I don't think Mr. Sisto attended that particular meeting. I am not sure.

Q And Johnston was in Boston. Was that the time? A He came down from Boston, so he told me. I wasn't in Boston with him.

Q I thought you testified that you notified him to come down, or something like that. A Oh, no; the arrangement for the appointment was made in Washington, but he had a business appointment in Boston, I think, the day before, or maybe the same day, but anyway he flew in from Boston. That is all I know.

Q And he attended the meeting? A Oh, yes.

Q But you didn't get Johnston to attend? That is, you didn't procure his attendance? A We made all of
141 the arrangements for that meeting, and, of course,

Mr. Johnston, or some partner of his firm, had to attend to complete the transaction. I wasn't authorized to do that.

* * * * *

142 Q Mr. Reily, I want to direct your attention now, and I certainly don't wish to confuse you at all, to the Racquet Club meeting that you referred to in your testimony. I believe that your testimony is that there was a further meeting at which a contract was alleged to have been consummated between you and Mr. Johnston. Am I right? A In connection with Barium?

Q In connection with Barium. A That is right, sir.

Q When and where did that meeting take place? A That took place approximately at the time that I took up my duties with Johnston, Lemon & Company. In other words, somewhere between the 1st and 15th of November, 1939, to the best of my recollection.

Q Now, that is the time. How about the place? A In Mr. Johnston's private office.

Q In his private office? A Yes.

Q What is your recollection about the parties present? A Mr. Johnston and I.

Q No one else? A No one else.

143 Q And it was at that conference, according to your testimony, that an agreement, an oral agreement, was made with Mr. Johnston that you would share profits. Is that correct? A That is correct.

Q None of his partners was present? A No, sir.

Q Do you know Mr. Harvey Gramm? A Very well, yes, sir.

Q What was his position with Johnston, Lemon & Company? A His position when I was there was a partner and sales manager.

Q And you are sure he wasn't present? A I am sure he was not present, when I talked with Mr. Johnston about Barium.

Q You did make retail sales for Johnston, Lemon? A Whenever I could, yes, sir.

Q Is there any dispute as to whether you were paid for those sales? A None.

Q Any claim? A None.

* * * * *

150 REDIRECT EXAMINATION

BY MR. OFFUTT:

Q When Mr. Towers was examining you, he asked you if you relied upon making your claim for the money you have asked for here, the stock you have asked for, if you relied upon the fact that there was a change in management, and you answered, "In part."

Now, will you tell the jury and the Court what entirely you rely upon in making your claim here? A I rely entirely upon the agreement that I had with Mr. Johnston which was made when I first joined the firm of Johnston, Lemon & Company, that I would share in any profits that

may result in any way from the Barium Stainless Steel Corporation reorganization, refinancing, leasing, or whatever we could do in which a profit could be secured for the firm.

* * * * *

151

THOMAS YANCEY MILBURN

* * * * *

DIRECT EXAMINATION

BY MR. OFFUTT:

Q Will you state your full name, Mr. Milburn? A Thomas Yancey Milburn.

Q Where do you live, sir? A Washington, D. C.

Q And where is your business address? A Barr Building.

Q What is your business, sir? A Consulting industrial engineer.

Q Before engaging in that business, what colleges did you attend? A University of North Carolina, civil engineering; University of Pennsylvania, special post-graduate work.

Q Do you mind telling us how long ago that was? A '14 Carolina; '15 Pennsylvania.

Q Since that time, sir, what business have you been engaged in? A Well, my father was in the practice of architecture. I joined him when I graduated from
152 school. I stayed with him until 1926. On his death I came to Washington from North Carolina and was made president of the company. The company was Mil-

burn, Heiss & Company, Architects. I practiced in that profession until 1932 and business got so bad you couldn't make a living in it, so I began the practice of consultant.

I had had, by that time, sufficient experience in building construction to be helpful for people away from Washington who needed contacts to get money to get construction methods, and generally consultant practice.

Q Now, what organizations or what corporations have you done business with? Can you give us some general idea of some of the work you have done? A Well, I was vice-president of Murray & Flood, International Engineers of New York. I represented the City of High Point, North Carolina, in a \$6,000,000 hydroelectric plant on the Yadkin River. I represented the Tampa Shipbuilding and Dry Dock Company of Tampa, Florida, in connection with six ships that they wanted to build for the Maritime Commission. The Nordbergin Gin Company of Milwaukee, Wisconsin. The Wisconsin Hydroelectric Power Company of Wisconsin in connection with hydroelectric development of the Wisconsin River.

Is that sufficient?

* * * * *

153 Q Did you know a Mr. J. A. Sisto, or know of that company? A Well, I met him. I didn't know him of my own knowledge. I met him through Mr. Reily there.

Q What offices do you hold in any organization
154 at the present time? A Until the 31st of this month I was vice-president of the Continental Gin Company of Birmingham, Alabama, who built cotton ginning mills; Milton Brady, industrial engineers, I was president of that; Automatic Arms Safety Company, I was president of that.

Q Do you know anything about the Barium Stainless Steel Corporation? A Would you like for me to just start and tell you what I do know about it?

Q Yes. I guess that is a better way to approach it. Tell

us what you know about it, how you go into the matter, and that will cover it very fully. A In late '38 or early 1939—I am not sure which; probably a month or two one of the other—Mr. Reily came to my office and said that he was familiar with the Barium Stainless Steel Corporation, knew the president and chairman of the board, or whichever he was at that time, Mr. Sisto, and said that he thought the company should be making money and they were not, they were in debt to the Reconstruction Finance Corporation, and he wondered if any of the people with whom I was connected might be interested in attempting to put the company in better shape than it was.

I told him if he would get the full information and
 155 plans of the plant and list of their tools, offices, financial statements, that I would be glad to go into it and see what interest might be evidenced. Mr. Reily got that for me and I studied the plant and found it to be a pretty good little ten-acre plant, with poor management, because they weren't apparently selling anything, and they should have been, and I suggested to probably a half dozen clients of my office that they might be interested in going into it. This, of course, went over the period of practically the whole of 1939. Some of them would evidence interest, and on closer examination find they didn't have an interest. Others would offer something that was unacceptable to Mr. Sisto. The result was that after about a year's hard work, or more, at that time, nothing really was successfully consummated. Mr. Sisto came to Washington about the middle of that time and asked me if I would identify myself closer with him and see if I could sell any of the products that they would make, or sell their facilities, which I agreed to do but was unsuccessful in at that time. Of course, during this period of time Mr. Reily was in and out of my office working on the matter, representing the motivating influence that kept the thing going. I was pretty busy, and

didn't have much time to do other than contact my own clients and see if they had an interest in it.

* * * * *

158 A Mr. Sisto came to Washington first, several times. No, that isn't right. The first time I met Mr. Sisto I met him in New York with Mr. Reily, and I met him there several times before the date that I read here, May 14, when he came to Washington, and that was 1940.

* * * * *

160 Q Now, during the period of time when you were active in this Barium Stainless Steel matter and studying the same, were you in touch with Mr. Reily at various times? If so, tell us how often and what you did together. A Well, Mr. Reily having brought the matter into the office, followed up on it, I would say, weekly at least; some times more than that. We made several trips to New York to meet Mr. Griffiths, Mr. Bowman and the other companies that we were trying to interest in this, with Mr. Sisto, and at times some of his associates in the company. I would say that we went to New York not less than a half dozen times for that single purpose.

Each time we saw Mr. Sisto and once Nobel Jones, who was vice-president and Works Manager. Sometimes other directors would be in Mr. Sisto's office.

Q You mentioned Rear Admiral Conard having gone on the board some time in 1940. A That is the best of my recollection.

Q Now, before going on the board, did you have any conferences or consultations with any of the members or representatives of the Barium Stainless Steel about this

change of management or personnel? If so, tell us what.

A I, of course, after studying the records that Mr. Reily gave me, was quite frank with Mr. Sisto and told him that I didn't think the way the Board was constituted, the way they were doing business, that they would get very far, and I engaged first to attempt to get a continuation of their loan which was overdue, both as to principal and interest. I approached the RFC on that basis and told them that I felt we could put a Board in there that would be acceptable to them and who would, in time, be able to work them out of their loan. That met with good reception. We were given a six months' stay of execution, as it were, under 77(b) and I think it was just about that time that I suggested Admiral Conard to Mr. Sisto as a man who the RFC would have faith in as well as confidence in.

I am sure that that was the reason that Admiral Conard went on the Board.

Of course, later on, the time went on, and I made three trips to RFC to get the loan extended, and each time it was extended, and ultimately paid in full with all interest, in full.

Q That is after the reorganization? A That was after the reorganization, yes.

Q Mr. Milburn, do you know of the time in October, or some time in 1940, when the refinancing of the Barium Stainless Steel was discussed with Tobey & Company? A I have a transcript from my office record at that time. Since that was brought up in my deposition, I brought it here.

Q Tell us first, how that meeting came about? A Well, as I said before, nothing had eventuated out of the year's work we did in 1939, and in 1940 we kept working on it. Admiral Conard went on the Board in May or June, somewhere around the middle of the year 1940, and after that I talked to Admiral Conard occasionally and he said that while they were doing a little work

they weren't doing very much—they were handicapped by finances—and just at that time I had to get a second extension of the loan at RFC, and some time in September Mr. Reily came in the office and said that he heard that Sisto was about to do business with someone else and, of course, if he did, why, those of us who were working in there and had put in so much work would be out.

Q That is September, 1940? A It was September 25, 1940, to be exact. At that time my notes say "Milburn was very apprehensive that Sisto was working on another deal and asked Reily to have Mr. Johnston check on Sisto and find out what was doing before Milburn committed himself to Colonel Bower."

Colonel Bower was a British officer attempting at that time to get some gun forgings made in this country.

Shall I go ahead?

Q Yes, go right ahead. A The matter moved along several days, September 26th. Reily discussed with Johnston and insisted that he call Sisto. He called Sisto, 163 but stated that he had a deal pending but would much prefer to do business with Milburn and Johnston. Milburn gave this information to Reily. Johnston was in New York at the time.

We discussed the matter, apparently here, over several days. I think I went to Mr. Johnston's office and Mr. Johnston and myself, or one of us, called New York, or I did when I got back, and talked to Mr. Sisto and asked him to hold the matter in abeyance until we could get up there.

About that time I learned that it was Tobey & Company, Mr. R. E. Eberstadt, president, and before I went to New York I think Mr. Johnston asked me, or Reily, or someone did, would I be interested in continuing with the company if it was refinanced, and naturally I said since I had put so much time and money in the thing, if he thought it could be done so profitably, I would be.

An arrangement was made whereby Mr. Johnston, Mr. Reily and myself, were to meet in the office of Tobey & Company in New York, because Mr. Eberstadt, who had been expected in Washington, was unable to get down in a period of a week or ten days.

Q That is Mr. Rudolph Eberstadt? A Yes. He signs it R. E. Eberstadt. He was at that time the head of Tobey & Company. I don't know his title. Then we did go
164 to New York and met in Mr. Eberstadt's office, that is Tobey & Company's office, on October 17, in the afternoon.

Q When you say "we went to New York," who went to New York on that trip? A Mr. Reily and myself went from Washington, and Mr. Johnston, I think, went to Boston the day before, or at any rate he came into New York and met us at Tobey & Company some time in the afternoon, perhaps 2 to 3 o'clock.

Q Now, up to that time of this trip to New York, October 17th, 1940, which you have given us the date of, had Mr. Johnston ever gone any place with you, or Mr. Reily, or would you yourself, in handling this Barium Stainless Steel matter that you can recall? A Well, I don't know exactly by where had he gone. I had been in Mr. Johnston's office with Mr. Reily and discussed the matter.

Q Let me clarify it this way: You say you went to New York? A Mr. Reily and myself went to New York.

Q Did Mr. Johnston ever go with you on any of those occasions? A No, I do not recall any such trip.

Q As Mr. Reily went, do you know whether he was in his individual capacity or appearing there in behalf of Johnston, Lemon & Company? A Well, of course,
165 I don't know anything about Mr. Reily's relationship with Johnston and Lemon other than that I was in his office with Mr. Johnston and Mr. Reily, and I assumed that he was working for him, but I know nothing about his contract with him or association or whatever it might have been.

Q Where did that meeting of October 17, 1940, in New York take place and what took place? A In the office of Tobey & Company, and Mr. Eberstadt was there first. He brought in one of his partners, I think, and we talked generally about things, waiting for Mr. Johnston to arrive.

Mr. Johnston arrived perhaps an hour after we had been there and then Mr. Johnston and Mr. Eberstadt began to discuss the proposition.

Q Now, do you recall any conversation that took place with Mr. Eberstadt? A You mean with me?

Q Yes. Was Mr. Reily present? A Oh, Mr. Reily was present the whole time that I was there.

* * * * *

171 Q Did any of that conversation, that you had before Mr. Johnston arrived, cover anything about you and Admiral Conard?

THE COURT: What you mean there is their going on the board of directors, don't you?

MR. OFFUTT: Yes, their going on the board of directors.

THE WITNESS: I can't fix anything in my mind whether it was before or after Mr. Johnston was in the room. I do know, as I think I testified, that Mr. Eberstadt asked me if we would go, and I believe that I testified that I told him that under proper inducement that I would, and that I also would attempt to get Admiral Conard to remain, and I think I also testified that he said that that was very important, that he wanted to know that we would be
172 on that board. I believe that is what I testified to.

Q Did he say how important it was, anything further about that? A Well, I think he made it suffi-

ciently clear to me that he wanted us on the board, and that was a factor in his decision of whether he was going to finance, or not.

Q How did you learn that Tobey & Company were the underwriters in this matter? I mean, from whom did you learn that? A Well, Mr. Offutt, it would be during that period of a week or ten days before the meeting of the 17th of October, because I wrote Mr. Eberstadt, prior to that meeting — although I had never met him — and I wouldn't like to say whether Mr. Johnston or Mr. Reily told me that Tobey & Company were the people.

Q With whom were you dealing in New York before you learned of Mr. Eberstadt of the Tobey & Company? A J. A. Sisto.

Q Can you tell us whether you ever discussed the matter with J. A. Sisto of the underwriting? That is, before you learned of Tobey & Company? A Yes, I think I testified that I had talked to Mr. Sisto over the telephone and he said that someone else was in the picture, but that he would
173 much prefer to have us in the picture than the other party, but he did not say who they were.

Q When you say "someone else in the picture," you are not talking about some other underwriter, are you? A Yes. You mean, other than Tobey & Company?

Q Other than Tobey & Company. A I couldn't identify it, because at that time I didn't know who it was to be. In other words, I think I testified that Mr. Johnston, Mr. Reily, and myself, discussed, and I don't know which one had learned, that there was going to be introduced someone into the picture who would push us out, perhaps, and I had no idea who that would be.

Q Then after you learned of Tobey & Company, and were in contact with Mr. Eberstadt of Tobey & Company, were you also in contact with a Mr. Sisto? A Oh, yes; yes, I saw Mr. Sisto—well, I was going to New York then

once a week, sometimes twice a week and I would usually drop by or call him on the phone, or try to find out what I could.

Q Do you know how Johnston, Lemon & Company got into the picture? A Yes, they were directed to Tobey & Company by Sisto.

Q Now, do you know why they were directed to Tobey & Company by Sisto? A Why?

Q Yes. A No, I do not. I know they were, but
174 I don't know why.

Q Did you ever discuss the matter with Mr. Sisto?

THE COURT: Discuss what matter?

MR. OFFUTT: Of how they got into the picture.

THE COURT: Of how who got into the picture?

MR. OFFUTT: Of how Johnston, Lemon & Company got into the refinancing.

THE WITNESS: Well, Mr. Offutt, after this meeting of the 17th, which I returned to Washington with inconclusive contacts as far as I was concerned at that time, there was an exchange of letters between my office and Mr. Eberstadt in which I outlined what I would do and what I would expect to be paid for it, which ultimately culminated in his making an offer to me to go into the company as vice-president and onto the board. The next information I had was about November 8 when a notice was put on the wire, and also a letter from the Johnston, Lemon Company, which was an announcement that the entire deal was set up, and it named Admiral Conard as chairman, and myself as vice-president—I don't know whether it named Admiral Conard, or not, because he was already on the board—but it named my entrance to the company; and shortly after that I wrote to Mr. Sisto a personal letter and asked him, I said that Admiral Conard seemed to be taken care of

and I seemed to be taken care of, and that Mr. Reily,
175 who had probably done as much or more in the thing
than we had—I think I asked him very facetiously
how, when, where, what and why he was going to be taken
care of. He wrote me back and said that inasmuch as he
had directed Johnston, Lemon & Company to Tobey & Com-
pany, that he assumed that Johnston, Lemon & Company
would take care of Mr. Reily.

BY MR. OFFUTT:

Q That was Mr. Sisto you are talking about, now? A
That was Mr. J. A. Sisto.

Q Do you have that letter? A Yes.

Q May I see that, sir? A I think I have it here; yes,
here it is (indicating).

MR. OFFUTT: May I have this marked for identifi-
cation, please?

(Letter, dated 11-18-40, Sisto to
Milburn, was marked Plaintiff's
Exhibit No. 7 for Identifica-
tion.)

MR. OFFUTT: I offer this letter in evidence, Your
Honor.

THE COURT: Is there any objection?

MR. TOWERS: I haven't read it, Your Honor.

THE COURT: All right; you may read it.

(Thereupon, Mr. Towers reviewed the letter.)

MR. TOWERS: Your Honor, may counsel approach
the bench?

THE COURT: Yes.

176 (Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

MR. TOWERS: I refer to the second paragraph.

THE COURT: What is your objection?

MR. TOWERS: My objection is to the second paragraph in particular which contains a feeling where he says he feels certain that certain things were to take place. I can't cross-examine Mr. Sisto on this subject, and there is an implication there that I am sure is not justified by the facts in this case. It is a kind of precatory expression on the part of the writer.

THE COURT: Was Mr. Sisto's deposition taken in this case?

MR. OFFUTT: Yes, sir, by the defendant.

THE COURT: Was he interrogated about this letter?

MR. OFFUTT: No.

MR. TOWERS: I will go into that, Your Honor.

THE COURT: Weren't you represented at the taking of the deposition?

MR. OFFUTT: We went into that later and I waived my right to be there. But no mention was made of the letter. In fact, I didn't know about the letter.

MR. TOWERS: I didn't either, Your Honor.

THE COURT: I think if you can prove this to
177 be Sisto's letter that it ought to go in for what it is worth, because one of the very critical things here is that this plaintiff was the one responsible for Johnston, Lemon & Company being named as a participating member. That is really one of the critical questions.

MR. TOWERS: Well, in the second paragraph of this letter the expression is very equivocal.

THE COURT: It may be, and you may argue that it means thus and so, and he may argue differently, but I am talking now about here is a statement by the man who is one of the principals in these negotiations and you are relying quite a bit, as I understand it, on his testimony, or at least your statement to the Court was that you were.

MR. TOWERS: Yes, sir, he would have been interrogated about this letter had I known its existence, but it was not in my hands nor in the hands of my client, you see. It was in the hands of this witness who is a stranger to the transaction.

THE COURT: But you could have asked Mr. Sisto if he wrote anything or what he wrote, and so forth. He was your witness and you could have interrogated him on that.

It is clearly admissible if it is inconsistent with Mr. Sisto's testimony.

MR. TOWERS: It is not inconsistent.

MR. MYERS: May it please the Court, may I say
178 that there is nothing directly stated by the witness
here. He only infers and feels and assumes. It is no
direct statement.

THE COURT: Certainly not. I am not going to the weight of it. But I am talking about it is in reply to what the witness says he wrote him that this man has done as much or more than any of them and how is he going to be taken care of, and this is his reply. I think it is pertinent.

MR. TOWERS: If Your Honor sees fit to let it in, for the purpose of the record I will preserve an exception.

THE COURT: Certainly.

There isn't any question about that being his signature, is there?

MR. TOWERS: I believe Mr. Johnston knows his signature.

THE COURT: Well, ask him.
(Counsel returned to the trial table.)

MR. TOWERS: Your Honor, I think there is no question as to the signature.

THE COURT: Well, I will admit it.

(Letter heretofore marked Plaintiff's Exhibit No. 7 for Identification was thereupon received in evidence.)

MR. OFFUTT: May I read this letter now, Your Honor?

THE COURT: Yes.

MR. OFFUTT: Plaintiff's Exhibit No. 7, on the letterhead of J. A. Sisto & Company, 60 Wall Street, New York, dated November 18, 1940.

The letter is addressed to Mr. T. Y. Milburn, Barr 179 Building, Washington, D. C., and reads as follows:

"Dear Yancy:

"My advice to Phil Reily is that he should look for compensation or interest from Messrs. Johnston, Lemon & Company. This is in reply to your request as to my opinion—'where, what, when and why we, you or they should do about it.'

"Very frankly, in directing Johnston, Lemon & Company to Tobey & Company, I felt certain in my mind that Phil's efforts would be recognized by them.

"Sorry to have missed you while you were in New York. I hope the next time we can connect.

"With kindest personal regards,

"Sincerely yours,
"J. A. SISTO."

BY MR. OFFUTT:

Q In your opinion, Mr. Milburn, just how important were Mr. Reily's efforts in behalf of the Barium Stainless Steel matter that you have just testified about?

MR. TOWERS: If Your Honor please, I don't believe that the question is quite proper to ask Mr. Milburn's opinion.

THE COURT: I am somewhat inclined to agree with you.

MR. OFFUTT: That is all. We have no further questions, Your Honor.

* * * * *

180

CROSS EXAMINATION

BY MR. TOWERS:

Q Mr. Milburn, do you know anything whatever with reference to any contract that may or may not have existed between Reily and Johnston, Lemon & Company? A Absolutely nothing, sir.

Q You know nothing about that? A No, sir.

Q You know nothing about whether he is or is not entitled to any compensation from Johnston, Lemon? A If I didn't know they had a contract or some association, I couldn't know that.

* * * * *

181

Q Anyway, there was a lot of work done by you and Mr. Reily? A I felt so.

Q What was the result of those efforts? A Well, very definitely some results, Mr. Towers. We stayed execution from RFC for eighteen months and held Barium alive. We did that the hard way without money. We made a report to the company of what they would have to do in order to actively report to the company of what they would have to do in order to actively get into big business. We gave Mr. Sisto several contacts which he did not have which he later used, such as Admiral Conard and other similar instances.

182 As far as definite earning money—well, prior to that time, we had also contacted the Cleveland office of the District Ordnance Office and attempted to interest them in the plant if it were usable in their program, ordnance development. Stages of the development of Barium, of course, started when they were delinquent on a \$150,000 loan plus interest, stopping them from being foreclosed; of course protected Barium and kept them in business. I did that on three different occasions before they finally paid off their loan and interest in arrears. I am speaking now of all of the period of time up to, say, October 17, 1940.

Of course, one year of that, or approximately one year, since I don't know when Mr. Reily went with Johnston, it was done without Johnston, Lemon, and the other year was done with Reily with Johnston, Lemon.

* * * * *

Q Mr. Milburn, who got the benefit of those services? Was it the Barium Company? A Well, I would say everybody who has been associated with the Barium Company, including myself, Admiral Conard, the Barium Company, Reconstruction Finance Corporation; in other words, anyone who has not made any money out of it, made it because we kept it alive, or I kept it alive, the first year that I knew about it.

Q Now, you have said that you kept it alive. Do you mean that you did or that Mr. Reily did, or both of you, or Admiral Conard, or who do you mean? A Well, we all did.

Q You all did? A I didn't mean to segregate to myself the entire job. It took all of us.

Q You were engaged in a joint enterprise, as it were, of keeping alive the Barium Stainless Steel Corporation; is that correct? A Well, I don't know just how far your joint enterprise reaches. There was no relationship between Mr. Reily and myself. There was no relationship between Admiral Conard and myself. There was no relationship between Johnston, Lemon and myself, other than friendship—I knew each of them—and if it were kept alive, and if something finally eventuated, I felt that we all might make something out of it, but as to joint venture, if you mean our combined efforts, it was the effort without the combination.

* * * * *

184 Q How did it happen that you went on the Barium Board? A Tobey & Company, Mr. Eberstadt, offered me certain salary and certain stop options to become an officer of the company and go on the board, and I did. Although I was connected with the company prior to that through my knowledge of Mr. Sisto.

Q I was going to ask you about that. Now, do you believe that Mr. Reily is responsible for the position that you occupied upon the board of or as an officer of the Barium Stainless Steel Corporation? A Well, I don't know how to answer that question, Mr. Towers. Of course, I met Sisto through Reily, and I met Tobey & Com.
185 pany through Mr. Reily, with Mr. Reily. The interest which I had in Barium Stainless Steel Corporation was certainly kept alive over a year to two-year period

—well, for a year anyhow—by Mr. Reily. What bearing that may have had, I don't believe I could probably say. I think that Mr. Eberstadt would have to answer that since he is the one that made the proposition to me.

Q Mr. Eberstadt asked you to go on the board? A Yes.

Q How about Admiral Conard? How did he happen to go on the board? A Late in 1939, after I had made a dozen trips to New York and studies of the situation, and found out there was probably work available, I asked Admiral Conard if he would be willing to go on the board and he indicated that he would, and I think I communicated that to Mr. Sisto and he was asked to go on the board and subsequently did in that year, 1940.

Q Well, in other words—correct me if I am incorrect—but I wish to get the picture clearly in my mind; Mr. Reily introduced you, as I understand, to Sisto? A That is right.

Q Sisto introduced you to Eberstadt. Is that correct? A No.

Q Reily introduced you to Sisto? A That is correct.

* * * * *

186 Q Well, do you remember how you first became acquainted with Eberstadt, Rudolph Eberstadt? A Well, that is what I am attempting to say there. I think that I was introduced to him over the telephone either in Mr. Johnston's office or in my office, he being in mine, or I being in his, or when he was due down here and didn't come, after I had been advised that he was going to be the man who did the financing.

Q Now, there are several personal pronouns in here. When you say "he," do you mean he, Mr. Johnston? Do you mean that in connection with the introduction?

THE COURT: I think you had better read the question, Mr. Reporter, so Mr. Milburn can see what "he" you are talking about.

(The question, as above recorded, was read by the reporter.)

THE COURT: "He" there means Mr. Johnston, doesn't it?

THE WITNESS: That is right. I am almost sure that the telephone conversation took place from Mr. Johnston's office, with Mr. Reily and Mr. Johnston and myself there. But I won't, under oath, say that that is so.
 187 It might have been in my office, because Mr. Johnston was in my office several times during this period and I was in his several times during this period of time. It was the critical time of this entire deal because it started with my thinking we were out of the picture and wound up with our being in the picture and there was about a 45-day period in there that we were pretty close together.

* * * * *

189 REDIRECT EXAMINATION

* * * * *

Q I am looking now at the prospectus, and on page 7 it says that the corporation had been informed by the underwriters that they have agreed with Messrs. T. Yancy Milburn, Jules R. Brochard, and Admiral Charles Conard that
 190 if each of them serves as a director of the corporation for one year from the effective date of this registration statement, Tobey & Company will grant

them the right to purchase 5,000 shares each of common stock of the corporation out of the 122,600 shares of Tobey & Company, which Tobey & Company are granted the right to purchase under the terms of the underwriting agreement, dated October 4, 1940; as and if such options accrue to Tobey & Company, at the same—\$1.50 per share.

That is the period of time I am asking you about. You say you signed the contract? A That is right.

Q But you don't know whether Admiral Conard signed such a contract? A You, see, Mr. Offutt, Admiral Conard was on the board when I went on it, so I don't know what he may have done.

Q Well, did he agree to serve for that length of time? A Admiral Conard served from the time he went on the board, which I have testified, I thought, to be May or June of '40, until exactly the same date that I resigned on January 17, 1942.

* * * * *

193

RALPH S. RICHARD

* * * * *

DIRECT EXAMINATION

BY MR. OFFUTT:

Q State your full name, please. A Ralph S. Richard.

Q Mr. Richard, where do you live? A 1105 North Stafford Street, Arlington, Virginia.

Q Where are you employed? A I am employed by Johnston, Lemon & Company.

Q In what capacity? A As office manager and cashier.

Q Do you have charge of the records that show the profits of the Johnston, Lemon & Company? A I do.

* * * * *

206 A We received 7,000 shares of Barium Stainless Steel and received a check for \$1,544.13, as recorded on that blotter page there (indicating), and that was our full underwriting participation in the Barium Stainless Steel.

* * * * *

215 REDIRECT EXAMINATION

* * * * *

216 THE COURT: Let me interrupt you for a question, please.

MR. OFFUTT: All right.

THE COURT: I think I was a little bit misled, if you call it that, or had a wrong understanding. When was this item of \$7,000 reported as income—for what year? Do you keep a calendar-year basis?

THE WITNESS: Yes, sir.

THE COURT: In what calendar year was it reported?

THE WITNESS: The calendar year 1942.

THE COURT: 1942?

THE WITNESS: Yes, sir.

THE COURT: Because you had an arrangement whereby you were to get certain stock and you fixed the value as of a certain time in that year?

THE WITNESS: That is right, sir.

THE COURT: And you actually received it in '43; is that right?

THE WITNESS: Physically received it in '43; that is right.

THE COURT: So you gave it the value you had theretofore put on it?

THE WITNESS: That is right. It was merely a book-keeping at that time.

217 THE COURT: It was stock to balance the receivables?

THE WITNESS: That is right.

THE COURT: But the receivable was reported as income for the year '42?

THE WITNESS: That is right. Which would be logical.

THE COURT: Well, I understand, and it was on an accrual basis that you reported that as income, was it?

THE WITNESS: That is right, Your Honor.

THE COURT: Don't you see it now, Mr. Offutt?

MR. OFFUTT: I think I do, and yet I am not yet quite certain about it, Your Honor.

THE COURT: Well, it has been quite a little bit confusing because I thought at one stage of the game he was saying at the time he made that entry that he gave it that value by reaching back at a time when he should have received it and gave it the valuation then, but it appears now that he actually reported as income \$7,000 because he figured he was entitled to so much stock, and as of the date he thought he should get it, he thought it had a value of \$1 a share.

THE WITNESS: That is right, Your Honor. The other side of the entry would show that, Mr. Offutt.

That shows a credit to that underwriting receivables commissions account.

MR. OFFUTT: It doesn't show here where it says it was set up in '42. Come down and show it to me, 218 if you can.

THE WITNESS: It would not. This was merely a bookkeeping entry at that time.

MR. OFFUTT: You said it shows it was set up in '42.

Show that to the jury, if you can.

THE WITNESS: Well—

THE COURT: He said it showed that in the receivables.

MR. TOWERS: This is merely a bookkeeping entry in the year '42.

* * * * *

225 (Thereupon, the jury was excused.)

MOTION FOR DIRECTED VERDICT IN FAVOR OF DEFENDANTS

* * * * *

MR. TOWERS: I shall be brief. As Your Honor doubtless has anticipated, what I purpose to talk about has to do with a direction of verdict in this case.

THE COURT: I assumed it had possibly on the basis of the statute of frauds. I don't know. Is that what you address yourself to, or not?

MR. TOWERS: That is only one phase of the problem to which I address myself.

The other phase is the inadequacy of the consideration, if any, indeed, that moved from the plaintiff to the defendant in connection with the procurement of this deal.

Now, I want to go back just one step. Originally this case was predicated upon an alleged oral contract to share profits. The pretrial was had upon that basis. Even after the pretrial proceedings there was a motion for leave to amend, which I opposed. The motion, however, was granted and the complaint was amended so as to
 226 state a cause of action as upon a quantum meruit.

THE COURT: Well, isn't the question of contract in it still?

MR. TOWERS: It is in the alternative.

Now, in so far as the quantum meruit is concerned, if the plaintiff is pursuing his remedy in that regard, and I cannot now say whether he is—

THE COURT (interposing): Let me suggest a question in that connection. Has there been any proof of what the reasonable value of the services performed are?

MR. TOWERS: No, sir.

THE COURT: You are not grounding yourself on that, are you, Mr. Offutt?

MR. OFFUTT: No, Your Honor.

THE COURT: The proof hasn't been of a character that led me to believe, in fact, responsive to some cross examination evidence wherein Mr. Reily said he, in part, based his claim on doing certain things, and on redirect Mr. Offutt asked him what it was that he meant by that, what did he base his entire claim on, and he said the contract. So I rather got the view that whatever quantum meruit there might have been at one time in the picture, it is not in it now, and Mr. Offutt says that is so.

MR. TOWERS: I did, too, and I am very glad to have that clarified because it was only a month ago
 227 that the complaint was amended to reflect the quantum meruit theory, and I thought that was the ultimate theory.

THE COURT: Apparently it is the oral contract and part performance.

MR. TOWERS: Your Honor will recall, I am sure, that during the course of my cross-examination with Mr. Reily, I went near the witness chair and I asked him upon what his claim really was predicated.

I said "Mr. Reily, is it based upon the fact that you brought this piece of business to Johnston-Lemon?" And he said "Yes," he did; let's assume that he did.

Here is actually what happened according to the plaintiff's testimony. He never was connected with Johnston-Lemon until, let us say, the early part of November, 1939. When he came with the firm, he says, chiefly in the capacity of a wholesale salesman.

He says at that time that they went up to the University Club and they had this conference and then later they got into this star chamber proceeding with Johnston and they made a contract, and I suppose it is upon that contract which he now relies in.

THE COURT: I suppose so. I think possibly you needed the Racket Club luncheon conference before the office conference to sell out the completion on the thing, but I think that in so far as any contract in this
228 case relative to the Barium Steel Company is concerned, it found itself being in the office conference after the Racket Club conference.

MR. TOWERS: I think so, if the office conference took place, and we shall produce proof.

THE COURT: You understand what I am faced with now. I must take as absolutely true everything the plaintiff's testimony shows and all reasonable inferences favorable to him from it.

MR. TOWERS: I so understand, sir, and I am assuming that, too.

Now, before Reily came with Johnston, Lemon & Company in November of 1939, and beginning probably with the year 1936, Reily had some connection with Barium Steel, and Johnston-Lemon had also likewise had a connection with Barium Steel.

THE COURT: Oh, yes. As I understand it, they took some stock through Mr. Reily for sale to their customers.

MR. TOWERS: I think that was the testimony. In any event, Johnston was acquainted with Barium Steel in 1936.

Now, between '36 and '39, we don't question the facts, we admit the facts, that Reily tried to make 16 deals for the Barium Company. He tried the Aetna, the International, and all of them.

THE COURT: Yes, I remember it pretty clearly.

MR. TOWERS: None of those deals materialized or none of them inured to Reily or Johnston. Hence, up
229 to this point, Reily has rendered no service to Johnston-Lemon. He has been trying to make a deal.

THE COURT: That is right.

MR. TOWERS: Now, there came a time in 1941, January of '41, when the Barium stock came out under a registration statement for sale to the public. Now, Johnston is true participator in the underwriting. He was one of the underwriters. Plaintiff's Exhibit 3 shows on the left-hand side, as I recall, Tobey & Company in big letters, and on the right-hand side Johnston, Lemon & Company.

Now, we have heard something about the meeting in Tobey's office of October 17. It is a crucial date, 1940, and it was said by Mr. Reily that at that time the purpose of that meeting was the knitting together of the Barium Company with Tobey so that Tobey would agree on Octo-

ber 17 to take Barium on, and to underwrite it, and he says that was the sine qua non of the deal, and but for that October 17 meeting, et cetera, Johnston never would have received the benefit and the profit that he did.

Now, he said, what I had to do with the October 17 meeting was this, I persuaded Conard and Milburn to go on the Board. They were there through my offices although Milburn testified that he got Conard to go on the Board.

THE COURT: Well, I think Mr. Reily did, in effect, the same thing. He said he got Milburn, and through
230 Milburn the Admiral was gotten. I don't think that Mr. Reily takes the position that he alone persuaded the Admiral to go on. I didn't so understand his testimony.

MR. TOWERS: Perhaps he doesn't, but in any event he said he persuaded Milburn to go on, and those two things, linked up with Tobey, were the sine qua non of the underwriting. If it hadn't been for that service Johnston never could have profited and therefore he is entitled to a reward.

Now, I wish to call Your Honor's attention to Plaintiff's Exhibit 3. I am reading from page 9, and it says under the heading "Options", and this is referring to the underwriting agreement between Tobey and Barium:

"The underwriting agreement, dated October 4, 1940, (see below under 'Details of Offering') between the Corporation and Tobey & Company stipulates that provided Tobey & Company purchases all or any part of the said 250,000 shares of common stock within the 'selling period', the Corporation grants them the right to purchase"—and the options are thereafter discussed.

Again, on page 10:

"Under the terms of the contract between the Corporation and Tobey & Company dated October 4, 1940, the

Corporation has agreed to pay the fees of the underwriters' counsel, up to \$1,500."

Now, of course, the important thing, Your Honor,
231 is that date. October 17, the underwriting contract between Tobey and the Barium Stainless Steel Corporation was a fait accompli. This plaintiff predicates his claim, apparently—it is shadowy to me, but apparently it is predicated upon the basis of the fact that at that October 17 meeting he brought these forces together, and as a result of that action upon his part—

THE COURT (interposing): When was the conference on which it was agreed that Johnston, Lemon & Company would participate? What is the date of that?

MR. TOWERS: October 17, 1940.

THE COURT: Now, isn't that the only thing that is critical to this case, whether or not Mr. Reily, no matter what in view of, whether it was a number of unsuccessful efforts or whether some of the efforts had been successful as Mr. Milburn puts it, of keeping the company alive. No matter what the motivating force might have been, if what was done resulted in Johnston, Lemon & Company being put in as a participating underwriter, then, if the contract was such as to contemplate the sharing of the profits of the venture with Mr. Reily, isn't that enough to make the case? I mean, that is the point.

MR. TOWERS: It would be, Your Honor, I suppose.

THE COURT: Now, you are talking about consideration.

MR. TOWERS: I am talking about consideration.

THE COURT: Now, if the consideration of the contract was, and of course again I am taking as true
232 all the testimony and all the reasonable implications favorable to the plaintiff, that Mr. Johnston said

"No, I don't want you working on this Barium business on your own time. You have come with us; you have made an agreement; now, whatever profits we have, we are to share it, including the Barium. Work on my time, or on the time that you are supposed to be working for me. If something comes in, you get 50 per cent."

Now, he had, according to his testimony, struggled quite a long period of time to try to do something, and of course that means, tried to make some money out of the situation that arose from the Barium difficulties, and he hadn't been successful in doing anything more than helping to keep it alive, so it was still a potential source of profit.

Now, it wouldn't be unconscionable for his new employer to say "You may make something out of that" or "We may make something out of it. I don't know whether we will or not, but if we do then I will share it with you."

Now, that is not a contract without consideration, is it? Because he had, undoubtedly, I don't think there is any question about that, he had had a lots of contacts with the Barium people and he had a lot of it afterwards as the representative of his new employer, and whether he was as responsible as he thinks he is for the change in the management, or not, he certainly had something to do with it. He interested Mr. Milburn in the thing in the
233 first instance.

Now, Mr. Milburn didn't do it all out of eleemosynary motives or simply for friendship to Mr. Reily. His attitude toward Mr. Reily may have given the first consideration of it, but he thought he could profit by the proposition, undoubtedly, and I think presumably he did. But, nevertheless, they had been in the picture and had been in the picture to such an extent that Mr. Milburn, evidently, made inquiries as to how he was going to be taken care of, after first making perfectly clear that his own clients weren't going to have to take care of Mr. Reily,

so I couldn't see how it could be said that there was no consideration—assuming to be true everything that has been testified to, and all the reasonable implications—I wouldn't say that Mr. Johnston made a wholly one-sided deal in making the contract in question.

Do you? I mean, it looks to me like the facts almost speak for themselves; some money did come in, a pretty substantial piece of money.

MR. TOWERS: Well, it did come in, but of course Johnston had no employee, and Eberstadt, for six years—

THE COURT: You might prove that Mr. Reily had nothing to do with it, but I am talking about how the posture of the case finds itself now.

MR. TOWERS: It is clear to me, number one, from Plaintiff's Exhibit 3, that the underwriting contract was not signed by Tobey & Company as a result of any
234 effort that Reily expended in and about the business of getting Milburn and Conard on the Board, because it was his testimony that at this meeting it was said by Tobey & Company "All right, Reily, you go and get these fine fellows and we will do the underwriting."

My God, they had signed a contract over two weeks before; October 4.

THE COURT: Now, of course I can't assume that to be true because he testified somewhat differently on that score; that is, of getting these people in it, but as far as the contract here in question being without consideration, I don't think it reaches that. I mean, the contract here was "You work on the Barium business as part of your employment with us, and not separate, and if money comes in, I am entitled to share 50 per cent of it."

Don't you see what I mean?

MR. TOWERS: Yes, I do, Your Honor.

THE COURT: Now, his testimony is that his action is what is responsible for the business coming in to Johnston, Lemon & Company, or the underwriting fee, and under his testimony it looks that way.

Now, I am not—and I have to accept that as true now—the jury may think differently when you get through with them, and I am sure you will make a very earnest and vigorous effort to make them see differently, but I
235 am talking about now as a matter of law.

MR. TOWERS: I understand. Well, my problem goes to the question of whether those services or that consideration was substantial. Clearly, we have eliminated, or let me say arguendo that we have eliminated the Milburn-Conard consideration from signing of the underwriting contract because it was signed before this conference of October 17. Let's just assume that.

Now, the other consideration would be the intravention of Milburn to Barium. He didn't need to introduce, and he doesn't say that he introduced Johnston to Sisto, or Johnston to Eberstadt. He doesn't claim that. In other words, if his theory be that he was an agent acting between two principals, and that he was the successful intermediary through whom a transaction was consummated, he doesn't claim that. I am sure his testimony doesn't go to that line of reasoning, but the whole substance was what I have in mind, and Your Honor probably recalls the case as well as I. It is the case of Hecht Company versus Whiteford, in which a large verdict had been rendered in favor of Whiteford, a real estate man here, and he had succeeded in consummating a lease for the Hecht Company, and what actually took place was that Rosinski knew the Hecht Building was for rent so he got in touch with Whiteford. Through the joint efforts of Whiteford and Rosinski a proposal was made to lease the building for the occupancy of the Social Security Board, and the
236 rental was \$38,000 a year.

Well, the building was leased to the government for \$38,000 a year, but different agents were responsible for the new lease.

Now, Whiteford sued and he recovered a very substantial verdict and the case went to the Court of Appeals.

Here is what the Court of Appeals said, the language I have in mind:

“The appellee”—

and mind you, they reversed the case and said a verdict should have been directed.

“The appellee Whiteford had also the burden of proving that the commission of claim represented a fair and reasonable value of service.”

THE COURT: You don't have that here?

MR. TOWERS: No, we don't, but however “the services alleged to have been rendered consisted simply in discovering that the government needed office space and calling its attention to the property. For this trifling effort, the compensation allowed amounted to \$5,400 and some cents at the time of the verdict, and would accumulate at the rate of \$1,900 a year so long as the government occupied the property. The testimony to support this fee is based on a schedule made up by a combination of private real estate agents. That is a real estate board, a five per cent commission.

“However, in view of the failure of the appellee
237 to produce substantial evidence that he was the
procuring cause of the lease, we need not decide
whether a fee which appears on its face to be unconscionable can nevertheless be upheld as reasonable when it is supported by such testimony.”

Now, the question in my mind and the question which I wish to draw to Your Honor's attention for what it may

be worth is this: Can we put supposition upon supposition, and links in chains to the extent of saying "Well, if I hadn't introduced A to B and if B hadn't gotten C, or if I hadn't kept the X Corporation alive, whatever that means, then Johnston never would have derived this profit.

THE COURT: He doesn't have to go that far to make out his case at this moment.

All he has to do is show that there was a contract, and that, I must take as true. You must take it as true *arguendo* now, that if Johnston made any money out of it, he was to get half of it, and he did make some money out of it. That is all you have to do to prove the case.

Now, you can't say now for the purposes of this motion that the services rendered are negligible. You are saying now that the contract had no consideration.

Now, at the time the contract was made, it wasn't known what he was going to do, and it wasn't required that he do anything.

He was presumably known to be working with
238 these people, and it was known that he was still
working in their interest to make something out of
it. But what he was to do wasn't part of the contract.

The contract was "If any money is made out of it, I am to get half of it and you are to get half of it."

All you have to do is show the contract and show that there was money made out of it to make a *prima facie* case.

So you can't look forward to what was done to determine whether or not the contract, itself, had any consideration.

The consideration of the contract was "I will keep on doing what I can do so that we can make some money out of it." His part of the thing was "You do it on my time.

I will give you the opportunity, the time, and maybe the expense money of helping you do it, but I am to have half of what you make."

MR. TOWERS: Your Honor may be quite right about that. I wanted to call it to your Honor's attention.

Now, in respect to the statute of frauds, I have thought about it a good deal. This is an oral contract. I could argue to the jury that it doesn't make sense that such a big contract would be made.

THE COURT: Yes, you can do that on whether or not the contract was made, or not.

MR. TOWERS: But I have thought about it a lot. I take it that this is such a contract that could have been performed within a year.

239 THE COURT: That is the point I was thinking about.

As I understand it, the statute is a shield against oral contracts which are made which are not to be performed within a year. Now, what actually happens is not the criteria, but it is what is intended at that time to happen.

MR. TOWERS: That is correct, Your Honor, and I believe also that after services have been performed, assuming, as plaintiff says he performed services, the plea isn't good.

THE COURT: No, part performance takes it out of the statute.

MR. TOWERS: Hence, when you mentioned the statute, we have pleaded the statute and I have devoted a lot of thought to it, and I wouldn't attempt to argue further upon that point, sir.

* * * * *

I take it that the motion will be overruled?

THE COURT: I think I must at this time overrule your motion to direct a verdict, and I think I am right in doing it.

MR. TOWERS: Yes, and purely for the purposes of the record, I may have an exception?

240 THE COURT: Your exception will be noted.

* * * * *

PHILIP K. REILY,

* * * * *

246 DIRECT EXAMINATION

BY MR. OFFUTT:

Q Mr. Reily, after you obtained this letter, the original letter—I will put it this way: Did you obtain the original copy of this letter on March 5, 1940, which was addressed to Johnston, Lemon & Company, and signed by J. A. Sisto of the Barium Steel Corporation, return
247 it the next business day to Mr. Johnston in his office, and did he put it in the safe with a lock on it at that time? A He did, sir.

Q Do you have your original records which you kept in connection with your expenses incurred while you were working on the Barium Stainless Steel matter which would show your expenses for March 4 and 5, of 1940? A I do.

Q Are they records made at the time this took place? A That is right.

* * * * *

(3 yellow slips, heretofore marked Plaintiff's Exhibit No. 9 for identification, were received in evidence.)

MR. OFFUTT: May I read them to the jury, your Honor?

THE COURT: Yes.

248 MR. OFFUTT (reading):

“Phil K. Reily—Expense Account; New York City, March 4 and 5.

“Business—Barium Stainless Steel Corporation.

“Railroad fare—\$16.10.

“Hotel and meals—\$13.60.

“Taxi, entertainment, and miscellaneous—\$6.45.

“Total, \$36.15.”

BY MR. OFFUTT:

Q Who paid for that expense? A Johnston, Lemon & Company.

* * * * *

253 MR. TOWERS: Your Honor, before we pursue this matter of instructions, and I don't want to consume time, I shall be very brief; I renew my motion for a directed verdict based upon the argument that I made to your Honor the other day, namely, that the contract was lacking of consideration. I should amend that to say substantial evidence of consideration.

* * * * *

254 THE COURT: First I think I will adhere to the ruling I have made, that if the plaintiff's testimony is to be believed, the contract such as he testified about did have mutuality to it that would make it an enforceable contract, and therefore I should not direct a verdict on it, because I think it should be left to the jury to determine whether there was such a contract or not.

* * * * *

259

CHARGE TO THE JURY

THE COURT (Morris, J.): Members of the jury: I am quite sure you understand what kind of an action this is. It is a suit brought by the plaintiff to recover damages against two defendants, members of the firm of Johnston, Lemon & Company for what is alleged to be the breach of a contract made and entered into between the plaintiff and the defendants.

The jury is instructed that if you find that the plaintiff Reily and the defendant Johnston entered into an oral agreement whereby they agreed that Reily was to continue his efforts in connection with the Barium Steel Company, and that if any profit should accrue to Johnston, Lemon & Company from Barium Steel, that they were to equally share such profits, and if you further find that Reily did continue his efforts in connection with the Barium Steel Company and thereby assisted or contributed in the accrual of profits to Johnston, Lemon & Company, your verdict should be for the plaintiff.

If the plaintiff is to recover in this case, by reason of his having brought the Barium Stainless Steel Corporation deal to the defendants, he must prove by substantial evidence that he assisted and contributed in bringing about the choice of defendants as co-underwriters.

Now, the burden of proving those things is upon the plaintiff. He cannot recover unless he does prove those things that I have stated by a fair preponderance of the evidence.

260 Now, you must understand what that term means.

It means that the evidence on those points that he must prove must be more satisfying as to its truth, more convincing to you than the evidence to the contrary on those issues. It does not necessarily mean the greater

number of witnesses, nor the greater mass of testimony. It means just what I have said, that the evidence to preponderate must weigh heavier, must be more convincing, and satisfying, as to its truth than the evidence on those issues to the contrary. It must weigh more.

If it weighs less, if it is not as convincing as the evidence to the contrary, of course it doesn't preponderate. If it is equal and you can say that it is neither more nor less than the evidence to the contrary, it does not preponderate. If it is more satisfying to its truth, more convincing to you than the evidence to the contrary, then it does preponderate.

Now, certain stipulations have been made in this case to eliminate some questions that you might otherwise have to struggle with.

In making such stipulation, you must keep clearly in mind that it carries no implication at all that there is anything agreed upon except what the stipulation states because the issue is perfectly clear on the part of the plaintiff that there was a contract, on the part of the defendant that there was no contract. On the part of the plaintiff that he contributed certain assistance toward
 261 getting the profits that did come into the firm, and the contention by the defendant that he did not do so.

But it has been stipulated that should you find for the plaintiff, what the damages would be under the evidence in the case.

* * * * *

Now, the statement of the issue is simple. I have
 262 stated it. The questions I have mentioned to you are the questions you are to decide. They are to be decided by you by weighing the evidence which you have heard, rejecting and discarding any of it that you do

not believe to be true and accurate, and basing your judgment on that which you do believe to be true and accurate.

You are the sole judges of the facts in the case. It is for you to determine those facts by weighing the evidence as I have said. You are the sole judges of the credibility of the witnesses. It is for you to say what you believe to be true and accurate of what you have heard as evidence and testimony in this case and what you do not accept to be true and accurate.

Now, in determining the credibility of the witnesses, in determining what evidence you accept to be true and accurate, or otherwise, you may call to your aid and assistance certain guides, certain principles which the law, out of long experience, recognizes to be reliable ones; not necessarily infallible, and, therefore, you are to
 263 make use of them only to the extent that you think they help you to arrive at the truth.

For instance, in weighing the testimony of any witness, you may consider the interest, if any, which such witness has in the outcome of the trial, and consider and determine whether or not such interest has or has not colored or affected the testimony there. You may consider the opportunity or lack of opportunity of a witness to know the matters about which the witness is testifying, his opportunity to have observed such matters. You may consider the capacity and ability of a witness to have accurately recollected and accurately related what the witness did observe and know. You may consider the reasonableness or unreasonableness of a witness' testimony in helping you to determine whether to accept it as true and accurate, or otherwise. Its probability or improbability. You may consider with respect to those witnesses that you have seen, the appearance and demeanor of a witness on the stand, which is simply another way of saying what all of us do in everyday life, you take into consideration by the way a person

looks and acts whether that person is telling that which he actually knows to be true, or the contrary.

If you believe it is shown that any witness is biased or prejudiced either for or against either party to this cause, you must consider and determine whether or not
 264 such bias or prejudice, if any, has or has not colored or affected the testimony of such witness. If you believe any witness has testified falsely concerning any material fact in the case, and as to which the witness could not reasonably have been honestly mistaken, you have the right to reject and discard entirely all that that witness has testified to on the principle that one who testifies falsely about one material matter may be testifying falsely about others or all.

I say you have the right to do that, namely, to discard all the testimony of a witness who you believe has testified falsely to a material matter, but you are not required to do that.

You may if, in your good, sound judgment and discretion you think you should, accept as true part of what a witness has testified to if you believe it to be true, even though you do reject as false other parts of the testimony of such witness. Which illustrates the wide latitude that the law leaves to your judgment and discretion with respect to what weight to give the testimony of such a witness.

Now, if after weighing all of the evidence as I have told you you should, you find that the plaintiff is entitled to recover according to the principles I have just outlined to you, and that that has been shown by fair preponderance of the evidence as I have explained that to you, it would be your duty to find your verdict in favor of
 265 the plaintiff and fix his damages in the amount that I have stated to you.

If, on the other hand, you do not believe that the plaintiff has shown by a fair preponderance of the evidence that there existed the contract or that he performed the contract so as to assist or contribute in the accrual of these profits to the defendants, it would be your duty to find your verdict in favor of the defendants.

In any event, as I have said, you shall find a verdict in favor of the defendants on the counter-claim of \$583.86.

Now, in the liberations if you should discover that I have not explained clearly some point which I have tried to make clear, you may let me know through the bailiff and I shall undertake to explain it better.

Is there any instruction that counsel for either side thinks I should give which I haven't, or clear up anything that I have? If so, come to the bench.

MR. TOWERS: May we approach the bench, Your Honor?

THE COURT: Yes.

(Counsel for both sides approached the bench and conferred with the Court in a low tone of voice as follows:)

MR. TOWERS: Your Honor, I think the charge that Your Honor has made is eminently fair and in accordance with our understanding. There is one question that remains in my mind, and that is whether we are perfectly clear on this question of consideration.

266 THE COURT: Well, you have saved your point on that. I gave the charge that I considered. I mean, in asking you if there was any other charge that you thought I should give, it was not going to affect what we have already decided.

MR. TOWERS: That was my only apprehension. Thank you.

THE COURT: Certainly.

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272

RALPH S. RICHARD

was called as a witness for and on behalf of the defendants and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. TOWERS:

Q Mr. Richard, will you state again, if you haven't stated previously, your connection with the firm of Johnston, Lemon & Company. A I am Office Manager and Cashier.

Q And what was your relationship to the firm in November of 1939? A At that time I would have probably been classed as the head bookkeeper or probably as the accountant.

Q Accountant? A Accountant or head bookkeeper.

Q Were you at that time in immediate charge of the books and records of the organization? A I was.

MR. TOWERS: May I have this document marked as Defendant's Exhibit No. 1 for identification,
273 please.

(Document entitled "Tobey & Company, Report on Underwriting of Capital Stock of Barium Stainless Steel Corporation for the period from January 2, 1941 to March 31, 1942" was marked Defendant's Exhibit No. 1 for identification.)

BY MR. TOWERS:

Q Mr. Richard, referring to Defendant's Exhibit No. 1 for identification, will you tell the Court and jury what this blue paper represents? A This blue paper comprises the certified accountant's report of the underwriting profits of the Barium Stainless Steel deal. It shows the distribution of—

MR. OFFUTT: I object to what he says it shows.

THE COURT: Yes. You are just designating what it is now. It has not been offered in evidence yet.

THE WITNESS: All right.

MR. TOWERS: I offer this in evidence, Your Honor.

THE COURT: Well, is there objection? I was assuming you were discussing the matter with Mr. Offutt.

MR. TOWERS: It requires a little explanation, and I was trying to make it clear to Mr. Offutt just what the purpose of the paper is and what its nature is.

THE COURT: In the light of that, do you have objection to its admission?

MR. OFFUTT: May I confer with my associate counsel?

274 THE COURT: All right.

MR. OFFUTT: We have no objection now, to it, Your Honor.

THE COURT: Let it be admitted, mark it Defendants' Exhibit No. 1.

(Thereupon Defendants' Exhibit No. 1 was received in evidence.)

BY MR. TOWERS:

Q Now, Mr. Richard, will you state from the standpoint of an accountant exactly what this paper represents.

A This paper represents a certified examination by Louis D. Blum & Company, who are New York certified public accountant, that certifying that they made an examination of the transactions relating to the underwriting of the Barium Stainless Steel deal, showing the income and expenses and the net profit from the deal and a distribution of that profit to the finders and the underwriters in the deal.

Q Now, the principal underwriter in the deal was who or what firm? A Tobey & Company.

Q Is this report addressed to Tobey & Company? A It is addressed to Tobey & Company.

Q And the copy which you now have in your hand was sent by Tobey & Company to Johnston, Lemon & Company. Is that correct? A Yes, sir, that is correct.

Q As of what date was the distribution of profit
275 from the Barium Stainless Steel deal, according to this accountant's report, made? A The distribution of profit was made for the period ending March 31, 1942.

Q And that profit was, according to this report, what? A 7,000 shares of Barium Stainless Steel stock. Johnston, Lemon & Company's share was 7,000 shares of Barium Stainless Steel stock and \$1544.13; underwriting profits.

* * * * *

302

RECROSS-EXAMINATION

BY MR. OFFUTT:

Q That \$1544 and some cents that Mr. Towers asked you about, is part of the cash profit coming out of the Berium Stainless Steel, isn't it? A That is right.

Q It has nothing to do with selling stock? A That is right.

* * * * *

303 Q What I am asking you about, you merely put
it on the books, no stock, no money changed hands
304 at that time? A Naturally that is right. Phys-
ically none.

BY MR. OFFUTT:

Q And you didn't get the stock until January 26, 1943?
A That is correct. Physically received the stock at that time.

Q And you made the income tax return as to the stock for the year 1942, but you didn't solve that income tax return until 1943, March 15, the limit? A That is correct.

Q Now, you didn't say anything about the \$1544.13. Did you declare that in your income tax of 1942? A The \$1544.13 has been reserved as a possible expense, legal expense arising out of this suit.

Q Did you declare that in 1942? A Well, under a proper accounting treatment, an item such as that could be properly credited to a reserve for contingencies, and was properly credited and has been carried as a reserve for contingencies, even though there was no liability thought to be due on the case, there would be certain legal fees and so forth arising out of the case. The item has been so set up in a reserve for contingencies.

Q You mean you anticipated a suit by Mr. Reily back there when you made that return? A The cash item was received June 28, 1943.

Q Yes, but you knew it was going to come just
305 like you did this stock when you got this May 12,
1942, didn't you? That is the date I read on there,
May 12, isn't it? A That is right.

Q And that is the day you got it, shortly after that?

A That is true.

Q And the \$1544.13 is right in there, isn't it? A That is correct. That is our participation, and I showed it according to the blotter yesterday.

Q Mr. Reily wasn't with your company in 1942. He left in June, 1941, didn't he?

* * * * *

Q Why didn't you make that claim—I don't mean to repeat a question, but why didn't you enter that \$1544.13 on your income tax return at the same time you did the 7000 shares of stock as \$7,000 which you had not received yet? A Well, I can't give you any particular reason for it myself.

THE COURT: What is that?

THE WITNESS: I can give no reason for it, Your Honor.

THE COURT: Let me understand better than I do. When you got this audit report, it showed to you that there was due to Johnston, Lemon & Company certain stock, didn't it?

THE WITNESS: That is right, Your Honor.

THE COURT: And you set that up in an account receivable on account of that, didn't you?

THE WITNESS: That is correct, Your Honor.

THE COURT: And when you got the stock, you then transferred the credit to the stock?

THE WITNESS: That is right, the stock account.

THE COURT: Now, I am interested, too, in knowing why when you got this statement you didn't set up some item of accrual of \$1,500 odd.

THE WITNESS: I know of no reason why it was not set up at the time.

BY MR. OFFUTT:

Q And the only thing you know about it is that it might have been held for that possible legal expenses in connection with this case. Is that what you had said? A

At the time of receipt in June of 1940—1943, I am
307 sorry—I know there was a discussion made at that time between, and instructions given to me by the partners that even though they considered there was no liability due under this suit, that they considered it logical that it could be set up in reserve for contingencies.

THE COURT: Well, the suit had already then been instituted?

THE WITNESS: Yes, it had been instituted at that time.

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JAMES H. LEMON

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DIRECT EXAMINATION

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319 Q Do you general partners have any general practice, or not, with reference to the formation of contracts of an important nature in your business? A Why, they are naturally discussed and discussed thoroughly.

320 Q Among all partners? A Among all partners. I, certainly as I am one of the two managing partners.

Q Do you know anything whatever, and if you do I want you to state it, with reference to an alleged contract

that is supposed to have been made with your firm between Mr. Philip K. Reily and the firm to the effect that Mr. Philip K. Reily would share 50 per cent of the underwriting profits that the firm might earn in the 1941 underwriting of the Barium Stainless Steel Corporation's common stock? A I know of no such contract.

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351 HARVEY B. GRAM, JR.

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360 REDIRECT EXAMINATION

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Q Mr. Gram, as sales manager of Johnston, Lemon & Company, did Mr. Reily ever mention to you at any time the alleged agreement under which he was to share 50 per cent of profits on the Barium deal, underwriting profits? Did he mention that agreement, that secret agreement between him and Mr. Johnston at any time? A Mr. Reily never mentioned to me any agreement that he had with Mr. Johnston or with the firm as to any profit other than the profits right here (indicating Exhibits Nos. 2 and 2-A.)

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BERNARD J. NEES,

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361 DIRECT EXAMINATION

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Q State your name, please, sir. A Bernard J. Nees, N-e-e-s.

Q And where do you live, Mr. Nees? A 4415 Clagett Street, Hyattsville, Maryland.

Q You are connected with the firm of Johnston, 362 Lemon & Company? A I am.

Q Are you a partner? A I am, sir.

Q When did you first become connected with the firm? A In November, 1929.

* * * * *

Q Now, you remember, do you not, the fact that Mr. Reily was a salesman with your organization? A That is right, sir.

Q What do you know, if anything, concerning the circumstances surrounding his employment? A I know nothing of the circumstances.

Q Well, let me ask you this: Does your firm 363 have any policy with respect to a discussion as among partners of all important contractual and other relationships that the firm enters into.

Do you have any policy? A Yes, sir.

Q What is that policy? A Generally any important contracts or relationships are discussed between the partners.

Q Now, I want to draw your attention to an alleged contract between your firm and Philip K. Reily, the plaintiff in this case, under which contract it is claimed Mr. Reily is entitled to half of the underwriting profits growing out of the 1941 underwriting of the Barium Stainless Steel Corporation stock.

Do you know anything about such a contract? A I do not.

Q Was such a contract ever discussed with you by any member of your firm? A It was not.

Q Was such a contract ever discussed with you by Mr. Reily? A Not to my knowledge.

* * * * *

377 THE COURT: Now, I understand that counsel wishes to read into evidence certain depositions. What is the first deposition to be read?

MR. TOWERS: The deposition, sir, is that of Joseph A. Sisto.

MR. MYERS: Yes, sir.

THE COURT: How do you spell it?

MR. TOWERS: S-i-s-t-o.

THE COURT: Now, members of the jury, where witnesses cannot be present at the trial, there is a provision in law under which their testimony may be taken by deposition, and the testimony of this person, Joseph A. Sisto, has been taken in this cause by deposition, and you
378 will receive that testimony as any other evidence offered in the case and give it consideration along with all of the other evidence in the case. It is subject to the same scrutiny that you apply to testimony given in the presence of the jury to the extent that you can, and if you believe it, you must give it the weight that you would give the testimony given in court.

Proceed, Mr. Towers.

(The deposition referred to was read as follows:)

“Question: Will you give the Reporter your name?”

“Answer: Joseph A. Sisto.

“Question: Your residence?”

“Answer: 447 Ridgewood Road, South Orange, New Jersey.

“Question: What is your occupation, Mr. Sisto?”

“Answer: I am a banker and industrialist.

“Question: Are you in any way connected with the Barium Stainless Steel Corporation?”

“Answer: Yes. I am chairman of the Board of directors, and a director of the corporation.

"Question: Were you in any wise connected with that corporation in 1941?

"Answer: Yes, I was.

"Question: In what way?

"Answer: As president of the corporation, and
379 a director, and representing one of the largest stock
ownerships of the corporation.

"Question: Mr. Sisto, are you acquainted with Mr. James M. Johnston, a member of the firm of Johnston, Lemon & Company, of Washington, D. C.

"Answer: Yes, sir.

"Question: Are you also acquainted with a man by the
name of Philip K. Reily?

"Answer: Yes.

"Question: Do you know anything about the participation of Johnston, Lemon & Company in the public offering in 1941 of certain shares of the Barium Stainless Steel Corporation?

"Answer: I do.

"Question: Did Mr. Reily have any part in obtaining participation in this offering by Johnston, Lemon & Company, so far as you know?

"Answer: No.

"Question: What do you know, Mr. Sisto, if anything, concerning the manner in which Johnston, Lemon & Company had a participation in this offering?

"Answer: When the corporation sought a banker to do some financing for the Barium Stainless Steel Corporation we had approached several New York houses and, amongst them, was Tobey & Company. Mr. Rudolph
380 Eberstadt, the principal partner, carried on negotiations with me, which resulted in our entering into a contractual relation for the issuance of some shares of Barium. During the negotiations I had indicated to Mr. Eberstadt the desirability of the issue and that previously, in either 1936 or 1937, J. A. Sisto & Company had also made an issue of stock and had interested many out-of-town dealers in placing the shares.

"I pointed out to Mr. Eberstadt that amongst them were several that I thought would follow on with him in the placing of these shares, and amongst the larger dealers I indicated Johnston, Lemon & Company, as one of the houses who had previously placed a numerical number of shares with their clients.

"Mr. Eberstadt replied that he knew the Johnston-Lemon outfit very well, as he had previously had dealings with them, and that he might give them a ring to see whether or not they would have a continued interest in the shares of the Barium Company.

"Evidently this resulted in their doing business together, as indicated in the public prospectus offering the shares. I might add that I wanted to introduce various dealers to Mr. Eberstadt and I recall that he specifically stated that he needed no introduction to Johnston-Lemon, as they had had several deals with them.

"That is the extent of my knowledge as to how Johnston-Lemon came into the picture.

"I know of no intermediaries or connections that brought it about. What I have just stated is, to the best of my knowledge, all that transpired, so far as I was concerned, with Tobey & Company's inviting Johnston-Lemon into the business."

MR. TOWERS: Will you refer to Mr. Eberstadt's deposition?

THE COURT: This is the deposition of Rudolph Eberstadt.

MR. TOWERS: Yes, sir.

MR. MYERS: Taken on the same day, Your Honor.

THE COURT: When were they both taken?

MR. TOWERS: They were both taken on the 28th day of October, 1943, in New York City.

THE COURT: All right.

(The deposition referred to was read as follows:)

“Question: Will you state your full name?

“Answer: Rudolph Eberstadt.

“Question: Your residence?

“Answer: Canton, Ohio.

“Question: What is your occupation, Mr. Eberstadt?

“Answer: I am president of Barium Stainless Steel Corporation, a Delaware corporation.

“Question: I want you, if you will, Mr. Eberstadt, to identify a prospectus that I now hand you, and state what that prospectus is. (Paper handed to the witness.)

“Answer: That is a prospectus reflective of a public offering of 250,000 shares of the common stock of Barium Stainless Steel Corporation, dated January 2, 1941.

“MR. TOWERS: I ask the notary to mark for identification the prospectus just identified by the witness.

“Said prospectus was marked Defendants' Exhibit 3 for Identification, October 28, 1943.

“Question: Am I correct in stating that Tobey & Company was the principal underwriter in this deal?

“Answer: That is correct.

“Question: Were there any other underwriters?

“Answer: Johnston, Lemon & Company, Washington, D. C.

“Question: Will you state the circumstances under which Johnston, Lemon & Company became an underwriter in this offering?

“Answer: Tobey & Company and Johnston, Lemon & Company in previous instances had done a great deal of business together: Johnston-Lemon had sold a great deal of stock which Tobey & Company had underwritten. In this instance, namely, the Barium Stainless Steel Corpo-

ration underwriting of 1941, Johnston-Lemon, by
 383 reason of their previous relationship with Tobey &
 Company, were approached by us with a view to-
 wards joining us in this underwriting. The underwriting
 was discussed, a meeting of the minds as to participation
 was arrived at, and they became underwriters with us at
 our invitation.

“Question: Do you happen to know Mr. Philip K. Reily?

“Answer: I have met him.

“Question: To your knowledge, did Mr. Reily bring Johnston, Lemon & Company, or any member of that firm, into this deal with Tobey & Company?

“Answer: In no shape, manner or form, did he have anything to do with it.

“Question: Mr. Eberstadt, in the underwriting business, what is meant by the term ‘finder’?

“Answer: A finder is an individual who brings a financing or a piece of business to an underwriter and, by reason of bringing the business to such underwriter, receives compensation for such introduction.

“Question: Were there any finders in the 1941 Barium deal?

“Answer: There were two. One, James H. Shackleton, of 41 South Clinton Street, East Orange, New Jersey, and another, William Norins, of 123 East 37th
 384 Street, New York City; and both of those finders were instrumental in interesting Tobey & Company in this business.

“Question: Were these finders compensated for their services?

“Answer: They were.

“Question: Was Mr. Reily a finder, in this case.

“Answer: No.

“Question: Was Mr. Reily, either directly or indirectly, the agent through whom Tobey & Company or the Barium Stainless Steel Corporation were brought into con-

tact with Johnston, Lemon & Company or any of the members of that firm?

"Answer: No."

"MR. TOWERS: I have no further questions."

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JAMES M. JOHNSTON,

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385

DIRECT EXAMINATION

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Q Will you give your full name, Mr. Johnston, to the Reporter and the jury? A James M. Johnston, 11 Duval Drive, Westmoreland Hills, Maryland.

Q You are one of the defendants in this case, Mr. Johnston; is that correct? A I am.

Q You are head of the firm of Johnston, Lemon & Company? A I am senior partner of that firm.

* * * * *

396 Q I want to ask you this, Mr. Johnston:

You have heard the testimony in this case. Whether at that time or at any subsequent time you made an agreement with Mr. Reily to the effect that you would share on any basis any part of the underwriting profits in the Barium Stainless Steel deal. A I made no such arrangement nor any arrangement in regard to sharing any part of the underwriting profit of the Barium deal with Mr. Reily.

Q Now, Mr. Reily—incidentally, let me ask you this: Did you then know or do you now know—

397 Strike that question, please.

Did you then know that Reily had a connection of any sort with Barium? A I knew at that time that he had spent a lot of time trying to make a deal on Barium.

Q When you say "deal", what do you mean? Let's clear that up. A I mean he had tried to sell Barium. Everybody knew that Barium was open for a deal, if you wanted to go do something, or if you could sell them to somebody, or if you could merge them with somebody, or if you could finance them, there were dozens of people that knew that. I suppose that is the reason these two finders that brought the deal to Eberstadt finally dug up the deal. I knew that he was trying to make a deal on Barium.

Q After he was employed in your office, Mr. Johnston, did you have occasion to either take Mr. Reily to New York or to pay his expenses to New York at any time? A I took Mr. Reily to New York at one time.

Q More than once? A Only one time to my knowledge. I took him there, or else I had him meet me there.

Q What was the purpose of such a meeting? A I was going to use Mr. Reily in the distribution of the stock of Barium.

We were going to try to sell stock in Barium to
398 other dealers, and I was going to use Mr. Reily as a
wholesale salesman to go around and call on dealers and discuss Barium with them and try to get them to buy stock from our underwriting group and sell it to their clients.

We had already made arrangements with Tobey & Company to go in the underwriting. There was a meeting to be held at Tobey & Company's office. Mr. Milburn was to be there.

Q How long have you known Mr. Milburn?

* * * * *

How long have you known Mr. Milburn?

THE WITNESS: I have known Mr. Milburn for over 20 years.

BY MR. TOWERS:

Q Now, you were talking about a meeting, Mr. Johnston, in New York in which Mr. Milburn was present. Will you continue? A At that time Barium had a new
399 president that had been put in. He was going to be in New York. We were going to discuss the Barium set-up and I think the question was going to be discussed with Milburn and Eberstadt as to Milburn—you see, he hoped to get all this in Washington, the Navy Department, and other government departments, for the benefit of the company. This deal was in process. I don't know whether the registration statement had been filed at that time; I don't recall, but it is likely. I planned to send Mr. Reily around to see other dealers.

Now, when a wholesale salesman goes around to talk to dealers, he has to be as well posted as possible and know as much as possible about the company whose securities he is trying to get the dealers to come in and buy and sell to their clients, and I thought it would be helpful to Mr. Reily in his work in trying to sell this stock to meet the president of the company and ask him any questions he wanted or size him up and get his opinion of him, and meet Mr. Eberstadt, the head underwriter.

I don't think he had met Mr. Eberstadt, to my knowledge, at that time, or any other people who might be at the meeting, and I took him for that purpose.

Q Have you completed your statement? A I have.

Q Did you pay Mr. Reily's expenses? A I did.

* * * * *

400 Q Did you have any knowledge of the fact, and I think it was a fact,—you have heard the testimony here—that Mr. Reily had tried to make a lease here and a merger there?

Did you answer that question? A I knew he had been working around on a lot of deals trying to make some kind of a deal with the Barium Company.

Q Did you need any introduction to Eberstadt? A None whatever.

Q Did you need any introduction to Sisto? A No.

Q Did you need any introduction to any officer
401 or director or official of Barium?

I say, did you need any introduction by Mr. Reily? A No.

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406 CROSS EXAMINATION

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Q And I think you said that you knew Mr. Milburn twenty years? A I have known him around town; yes, sir.

Q What do you mean "around town"? Do you mean you knew of him? A I met him; I know him; yes.

Q How did you meet him? In a business way? A I have seen him out at the club and met him around town at various meetings. I have no business with Mr. Milburn.

Q How did you get to know him in connection with this Barium Stainless Steel matter? Did you call him in or did Mr. Reily bring him in to your office first? A He was a friend of Mr. Reily's and a client of his and I think our office did business with him in a retail way.

Q The question is, how did you meet Mr. Milburn first in this Barium Stainless Steel matter? Did Mr. Reily bring him in the office and introduce him to you or did you invite him into this Barium Stainless Steel matter and introduce him to Mr. Sisto? A I think I met him in
407 this deal through Mr. Reily, probably.

Q Is there any question in your mind about whether you met him that way. A No.

* * * * *

Q Yes. In 1936, when you first learned of the Barium Stainless Steel Corporation stock through reading listing on the Exchange, you bought some ten thousand shares through the Sisto Company and then after you had bought it you found out that Mr. Reily, that is, the firm of Mayhew and Reily were interested in it and they got their wholesale commission off of what you bought; didn't they? A

Yes; I understand they got a concession off of the
408 dealers through the territory.

Q In other words, though you bought it through Sisto, the wholesale commission went through the firm of Mayhew and Reily? A I understand Mr. Sisto gave them an override on it.

Q Didn't you order five thousand shares and Mayhew and Reily went out and got the five thousand shares for you? A We may have put the order through them or direct through Sisto. It wouldn't make any difference. They got a commission on whatever shares Mr. Sisto sold in a certain territory.

Q And then following that there came a time when you learned that Mr. Reily was also endeavoring to do some work to benefit the Barium Stainless Steel Corporation by either merging or a lease, or in some way make the company's condition healthier for the stock market; didn't you? A I knew Mr. Reily spent a good deal of time working on Barium. He was trying to make a deal for himself to sell Barium and make a profit through the sale of Barium or through the merger of it with some other company.

Q So, when he was employed by your company in 1939, that was about November, 1939; wasn't it? A Yes; early in November.

Q You learned, did you not, that he had been working on this deal and it hadn't matured yet but there was
409 a possibility that it would mature; isn't that right?

A To which deal do you refer?

Q When I say "deal", I mean on the matter of Barium Stainless Steel Corporation set-up, either to work out some merger or leasing of the plant and the corporation property by someone else— A I knew, Mr. Offutt, that he was trying to make any deal that he could to sell Barium and make a profit, make a fee on it, or something.

Q And didn't there come a time when you learned—well, strike that; and let's put the question this way:

Didn't you and Mr. Reily discuss this matter of the previous work he had done and how he would do the work later, either continue on doing that work or discontinue it while he was working for you? A He told me that he was working on Barium and I told him to continue to work on Barium and if he could make a deal and sell Barium to U. S. Steel or sell it to John Smith or do anything he wanted to and make a profit for himself, I was very happy for him to do it.

Q You told him if he would make a profit for himself on the side? A That is correct.

Q On the side even while he was working for you it was all right? A Sure, our salesmen are independent contractors. If they can make another deal that is fine, we are very happy for them to sell a piece of real estate or sell a bank; that is not a part of his work with us.

Q I see.

Now, suppose he worked out the deal—I mean this leasing or merger of the Barium Stainless Steel; and I believe you said he was trying to do it with the Aetna Standard Engineering Company at that time? A That is right.

* * * * *

Q So you understood, and your testimony is that when you talked to Mr. Reily about it and he talked to you, it was only in an effort—there was only an understanding or a discussion between you and him as to

how he would profit if he managed to perfect this transaction? A He was coming to work for us as a retail salesman. It would be natural—he was working on that deal, trying to sell the company, and he discussed the thing with me probably a number of times. He would want to know whether it was all right for him to keep on trying to work on an outside deal; and I told him it was perfectly all right, and “If you can make a deal on Barium, get Mr. Milburn; and you and Mr. Milburn sell it to Aetna Standard Engineering or sell it to anybody you want, that is fine; you have made a fine deal for yourself, and you ought to make some money on it.”

We would be very happy about it.

Q Who was going to pay his expenses while he worked on that deal for which he was to get profit and you not share in it? A On the Barium deal?

Q That is right. A He would pay the expenses on it.

Q But you paid his expenses; didn't you? A We paid his expenses on the trip to New York when I
412 took him up to get familiar with the deal for wholesale. We paid his expenses when we sent him south for retailing stock or selling to other dealers and from time to time Mr. Reily was in need of funds and he might draw on his drawing account some money to pay his expenses, and if we saw fit to advance him some money, or loan it to him, he may have gotten money from us on his drawing account or might have used it for that purpose.

* * * * *

Q Now, you saw this letter dated March 5, 1940,
428 addressed to Johnston, Lemon and Company, and which Mr. Reily testified he obtained, Plaintiff's Exhibit No. 1?

MR. TOWERS: Your Honor, I don't recall just exactly what this letter is; I would like to look at it.

THE COURT: Yes; go ahead.

MR. TOWERS: I know it is in evidence.

BY MR. OFFUTT:

Q Now, did you know about this letter? A I don't recall that letter—until I saw it yesterday or some time, I think, when it was put on as an exhibit.

Q Do you know why Mr. Sisto said that? "In consideration of" the services of your company?

And Mr. Reily, you say, was the only one doing anything at that time.

"5% of all of the stock which may be received by the undersigned in consideration of the sale of its assets" would be paid to you?

And addressed to Johnston, Lemon? A I don't recall that letter. I think the first time I saw it—it seems
429 to be a copy of a letter—I think that is the first I saw of it, was when you put it in here. I don't recall the letter before it was introduced.

Q You wouldn't say that letter was received by your company; would you? A I don't recall ever having seen it.

Q Would you say it was never received by your company? A I can't say that it wasn't received, but I don't recall ever seeing it.

Q Well, did you inquire or make a search to see whether the original of this letter is in your files? A I have seen, I think, all the papers in our file on it. I don't recall that letter.

Q I asked you if since it was introduced in evidence you made a search or asked about it to see if that original copy of that letter is in your file? A I have looked through all the papers we have on Barium and I don't recall seeing that letter.

Q The question was: After this letter was introduced in evidence, did you make a search or ask that a search be made, or inquire to see if the original of that letter was received in your office? A I have been through the Barium papers we have many times, and I am fairly familiar with it.

Q Can you explain to the jury just why they
430 would write that letter to Johnston, Lemon,—Mr. Sisto, of Barium Stainless Steel, and offer to pay you, your company, “five per cent of all the stock which may be received by the undersigned”, which is Barium Stainless Steel, for the work that your company was doing when Mr. Reily was working on his own behalf at that time, according to your testimony? A I don’t recall the letter and I don’t know why it would be written. We had no contract, to my knowledge, which would cover anything. Whether it was done by Mr. Reily to protect him from Sisto, I don’t know.

Q Well, if that deal had gone through and your company had gotten five per cent of the profits, as he has said here, or five per cent of the stock, rather, would you have kept the stock and not given Mr. Reily any of it? A It is possible that a letter like that, if it were written, might be that he wanted to route the stock through us, somehow or other, to Mr. Reily. I don’t know; I don’t recall it and I never made any such contract with Sisto or anybody else in relation to Mr. Reily.

Q I am just asking you the question: If this deal had gone through and Mr. Sisto had sent down to your company, in accordance with the terms of this letter, five per cent of the stock, would you have turned it over to Mr. Reily, or paid him any part of it? A If there had been
431 any agreement to do it. I don’t know. That is apparently some deal that never came about, never was consummated. It referred to some special leasing, or something. If he had been entitled to it, he certainly would have gotten it.

Q Well, isn't this referring to the merger and the sale as he was trying to do on his own, as you have testified?

A It could well be. I don't remember the deal myself. I don't remember the letter.

* * * * *

Q Do you know why the 31544.13 was not placed in the 1942 tax return with the \$7,000 item when you received notice that the stock had been awarded to you from the \$1544.13? A I don't know why it wasn't placed in there right at the time, except, the only reason I could think of, would be that the cash, itself, had not come into our office and when the cash came in, then it would be credited to some account. At the time the cash was actually
432 received by Johnston, Lemon and Company, that \$1500 some odd, this suit had been filed, or some action had been taken, we thought it had no merit, but there would be legal fees, or something, connected with it.

THE COURT: Mr. Johnston, the question wasn't what happened to it when it came in; the question was: Do you have any explanation for it not being set up as a receivable, when you knew—

THE WITNESS: It had not come in as cash; it had been credited and we would probably throw it into the next tax year, which the cash wouldn't be credited until it came in, that was the actual cash.

THE COURT: That was why I asked your book-keeper about it. He said he had no evidence on it because you kept your books on an annual basis, accrual record.

* * * * *

435 Q Going back just a moment to that letter of March 5, 1940, which was addressed to Johnston, Lemon and which you said that you didn't see before or know about— A I have no recollection of seeing it; no.

Q Does this refresh your recollection?

Don't you remember that Mr. Reily went to New York on March 4 and March 5 of 1940. He came back to
 436 your office and handed you the original of this letter and you placed it in a file cabinet in your office with a lock on it? A I don't recall it.

Q Would you say that didn't happen? A I don't know whether it happened, or not. I don't recall anything about it.

* * * * *

438 Q Now, can you explain to the Court and Jury why it was that Mr. Sisto on November 18, 1940, felt as he did in this letter when he said this—addressed to Mr. Milburn—

“My advice to Phil Reilly is that he should look for compensation or interest from Messers. Johnston, Lemon and Co. This is in reply to your request as to my opinion—‘where, what, when and why we, you or they should do about it.’

“Very frankly, in directing Johnson, Lemon & Co., to Tobey & Co., I felt certain in my mind that Phil's efforts would be recognized by them.”

A I imagine what he had in mind was that he was very interested in Barium, the largest stockholder—representing the largest stockholder; that Mr. Milburn probably had asked him if he was going to pay Mr. Reily something for all this work he had done and Mr. Sisto apparently wasn't and thought maybe he could get us to pay him something.

Mr. Sisto can't make a contract for Johnston, Lemon and Company.

439 Q And, of course, Mr. Sisto never talked to you about his views and thoughts in the matter? A No; that was in answer to Mr. Milburn, apparently, from that letter.

Trying to get Mr. Milburn to get Reily taken care of on the work he did on the deal.

Q Mr. Milburn was trying to get in on the deal himself and help Mr. Reily out? A Mr. Milburn did get in. He became an officer of the company and did get paid a salary or took a salary in lieu of commission. But I don't know the details, but I know he became vice president of Barium Stainless Steel, and I think that was for the purpose of probably giving him some standing here in Washington when he went out to talk to the Government departments. He was vice president of the company and he could handle negotiations and contracts better.

Q Of course, you weren't directed to Tobey and Company by Mr. Sisto in order to pay Mr. Reily anything; were you? He is wrong about that? A We weren't directed for that purpose?

Q As he said in his letter; he didn't direct Johnston, Lemon and Company to Tobey and Company because he felt certain in his mind that Phil's efforts would be recognized by them—meaning you? A I have testified, I believe, that this deal came direct to us originally from
440 Tobey and Company.

Q Do you know why, after suit was filed on October 28, 1943, Mr. Sisto changes his mind about Mr. Reily being compensated and says this —

MR. TOWERS: Just a moment, if Your Honor please.

THE COURT: I think your question rather involves a conclusion of some kind.

Ask him if he knows why he testified, if you want to, but the changing of his mind is something that you can argue to the Jury; but I don't think the witness ought to be asked to testify about it.

MR. OFFUTT: Yes, Your Honor.

MR. TOWERS: Mr. Sisto was not cross examined on the subject, Your Honor.

MR. OFFUTT: That is right. I wasn't there and I make no point of it.

THE COURT: Yes; I understand.

BY MR. OFFUTT:

Q First, it says:

"Are you acquainted with Philip K. Reily? A Yes.

"Q Do you know anything about the participation of Johnston, Lemon and Company in the public offering in 1941 of certain shares of the Barium Stainless Steel Corporation? A I do.

441 "Q Did Mr. Reily have any part in obtaining participation in this offering by Johnston, Lemon and Company, so far as you know? A No."

Do you know why he testified that way after suit was filed against you, after writing this letter here?

If so, will you explain it to the Court and Jury? A Well, all I know is Mr. Sisto was sworn and he was asked these questions and he made his deposition and that is what he gave. But I don't know anything about Mr. Sisto's mind or why he made up his mind one way, or anything of that nature. His testimony was taken after he was sworn to tell the truth and so on and that is what he said.

Q Did you talk to Mr. Sisto between the time that the suit was filed against you and the time this testimony was taken? A Sure; I told Mr. Sisto—

Q I didn't ask you what you said.

Did you talk to him? A Sure; I called him and told him the suit had been filed and that we wanted to take his testimony and find out about that.

Q And that is all you talked about? That is all
442 you said?

THE COURT: Well, you stopped him when he started telling what he said.

MR. OFFUTT: Well, he has said it already and I am asking him now if that is all he said.

THE WITNESS: That is all the essential thing in connection with this. We would naturally want to call him and find out when he was available to take his testimony.

* * * * *

443 *Redirect Examination*

* * * * *

445 Q Referring to Plaintiff's Exhibit 1, this is the letter, Mr. Johnston, which has to do—it is a letter from Sisto, and which has to do with the fact that—

446 “confirm our understanding that for and in consideration of your efforts to negotiate and arrange for the completion of certain transactions with Messrs. K. Bert Bowman, Fred Griffiths, and/or E. E. Swartswelter either as individuals or with any corporation with whom they may be connected, looking towards the sale or lease of the assets and/or plant of the undersigned, that, in the event of the successful consummation of either event, the undersigned will pay to you for and in consideration of such services either

“(a) 5% of * * * the stock * * * or

“(b) in the event that it shall lease its plant for a period longer than three (3) months 5% of the rental which may be received therefor,”

Mr. Offutt interrogated you with reference to this letter and asked you whether you had made a search to find if it was in your files. Did Mr. Offutt request you to make such a search? A He did not.

No. 9267

BRIEF FOR APPELLANTS

United States Court of Appeals

DISTRICT OF COLUMBIA

JAMES M. JOHNSTON AND JAMES LEMON,
Trading as Johnston, Lemon & Company,
Appellants,

vs.

PHILIP K. REILY,
Appellee.

On Appeal from the District Court of the United States
for the District of Columbia

*United States Court of Appeals
for the District of Columbia*

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vs.

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Appellee.

On Appeal from the District Court of the United States
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BRIEF FOR APPELLANTS

Jurisdiction

This is an appeal from a judgment based upon a jury verdict in favor of plaintiff-appellee (hereinafter referred to

as plaintiff) against defendants-appellants (hereinafter referred to as defendants) in the sum of \$8,209.56 with interest at 6% from April 1, 1943, together with costs. (App. 7, 8).¹ Jurisdiction of this Court is based upon Section 17-101 of the D. C. Code (1940).

Statement of Case

Defendants, co-partners, trading as Johnston, Lemon & Company, have been engaged in the brokerage business in the District of Columbia for many years. During the month of November, 1939, defendants employed plaintiff as a salesman in their office. (App. 14) Plaintiff claimed that at or about that time an oral contract was made with Johnston, senior member of the firm, under the terms of which plaintiff would receive 50% of any profits plaintiff made for the firm on any business that justified it. (App. 16, 19-21)

Plaintiff testified that this agreement was made in Johnston's private office, with no one present other than himself and Johnston. (App. 19, 22, 66) Johnston denied that such an agreement had been made. (App. 122) None of the Johnston, Lemon partners had knowledge of such a contract, although all important contracts were customarily discussed with all partners. (App. 114, 115, 116)

In 1941 defendants became underwriters for and sold certain common stock shares of the Barium Stainless Steel Corporation, as a result of which defendants received as compensation 7,000 of these shares, plus \$1,544.13 in cash. (Ptff's. Ex. 3, App. 44, 118-122) Plaintiff claimed that he had been instrumental in producing this profit and that he was hence entitled to 50% of the stock and cash so received. (App. 51-54) Johnston immediately denied any obligation on the part of his firm to share this profit with plaintiff. (App. 53, 54)

¹ References in this brief to pages of the printed record, which is printed as a Joint Appendix to this brief, are made by the symbol "(App.)".

At the trial plaintiff produced but one witness, other than himself.² This witness, one Thomas Y. Milburn, was asked to identify a letter dated November 18, 1940, from J. A. Sisto to Milburn, being Plaintiff's Exhibit No. 7. Thereupon the following proceedings occurred (App. 78-80):

MR. OFFUTT: I offer this letter in evidence, Your Honor.

THE COURT: Is there any objection?

MR. TOWERS: I haven't read it, Your Honor.

THE COURT: All right; you may read it.

(Thereupon, Mr. Towers reviewed the letter.)

MR. TOWERS: Your Honor, may counsel approach the bench?

THE COURT: Yes.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

MR. TOWERS: I refer to the second paragraph.

THE COURT: What is your objection?

MR. TOWERS: My objection is to the second paragraph in particular which contains a feeling where he says he feels certain that certain things were to take place. I can't cross-examine Mr. Sisto on this subject, and there is an implication there that I am sure is not justified by the facts in this case. It is a kind of precatory expression on the part of the writer.

THE COURT: Was Mr. Sisto's deposition taken in this case?

MR. OFFUTT: Yes, sir, by the defendant.

THE COURT: Was he interrogated about this letter?

MR. OFFUTT: No.

² Plaintiff called defendants' office manager and cashier under subpoena *duces tecum* in order to secure certain accounting data. (App. 87, 88)

MR. TOWERS: I will go into that, Your Honor.

THE COURT: Weren't you represented at the taking of the deposition?

MR. OFFUTT: We went into that later and I waived my right to be there. But no mention was made of the letter. In fact, I didn't know about the letter.

MR. TOWERS: I didn't either, Your Honor.

THE COURT: I think if you can prove this to be Sisto's letter that it ought to go in for what it is worth, because one of the very critical things here is that this plaintiff was the one responsible for Johnston, Lemon & Company being named as a participating member. That is really one of the critical questions.

MR. TOWERS: Well, in the second paragraph of this letter the expression is very equivocal.

THE COURT: It may be, and you may argue that it means thus and so, and he may argue differently, but I am talking now about here is a statement by the man who is one of the principals in these negotiations and you are relying quite a bit, as I understand it, on his testimony, or at least your statement to the Court was that you were.

MR. TOWERS: Yes, sir, he would have been interrogated about this letter had I known its existence, but it was not in my hands nor in the hands of my client, you see. It was in the hands of this witness who is a stranger to the transaction.

THE COURT: But you could have asked Mr. Sisto if he wrote anything or what he wrote, and so forth. He was your witness and you could have interrogated him on that.

It is clearly admissible if it is inconsistent with Mr. Sisto's testimony.

MR. TOWERS: It is not inconsistent.

MR. MYERS: May it please the Court, may I say that there is nothing directly stated by the witness here. He only infers and feels and assumes. It is no direct statement.

THE COURT: Certainly not. I am not going to the weight of it. But I am talking about it is in reply to what the witness says he wrote him that this man has done as much or more than any of them and how is he going to be taken care of, and this is his reply. I think it is pertinent.

MR. TOWERS: If Your Honor sees fit to let it in, for the purpose of the record I will preserve an exception.

THE COURT: Certainly.

Plaintiff's counsel was then permitted to read the Sisto letter to the jury. For convenience, the letter is reproduced below, verbatim:

"Dear Yancy:

"My advice to Phil Reily is that he should look for compensation or interest from Messrs. Johnston, Lemon & Company. This is in reply to your request as to my opinion—'where, what, when and why we, you or they should do about it.'

"Very frankly, in directing Johnston, Lemon & Company to Tobey & Company, I felt certain in my mind that Phil's efforts would be recognized by them.

"Sorry to have missed you while you were in New York. I hope the next time we can connect.

"With kindest personal regards,

"Sincerely yours,

"J. A. SISTO."

In defense of this suit defendants produced, among other things, the deposition of Joseph A. Sisto, who at the time of the underwriting and sale of the Barium shares in 1941 had been the president of that corporation and a large stockholder therein. (App. 118) Mr. Sisto testified as to the manner in which Johnston, Lemon & Company had become co-underwriters with Tobey & Company in the Barium deal. (App. 117-119)

At the close of defendants' case, the issues were submitted to the jury, which returned the complained-of verdict.

Statement of Points

The trial court erred in admitting in evidence plaintiff's Exhibit No. 7, purporting to be a letter from J. A. Sisto dated November 18, 1940, addressed to T. Y. Milburn.³

Summary of Argument

The letter from J. A. Sisto to T. Y. Milburn dated November 18, 1940 (sometimes hereinafter referred to as the "Sisto letter") is pure hearsay. Its admission in evidence was timely objected to by defendants' counsel. Plaintiff's counsel was permitted to read the letter to the jury. Its source and contents must have affected their verdict, since the letter prejudged the very question to be submitted for their consideration. Defendants' counsel had no opportunity to examine Sisto regarding the letter; and Sisto had no chance to explain it. The letter was improperly admitted in evidence.

Argument

The trial court erred in admitting the Sisto letter in evidence. Argument upon this point logically begins with a consideration of the character of the letter. It is pure hearsay.

"Hearsay has been defined as evidence which derives its value, not solely upon the credit to be given to the witness upon the stand, but in part from the veracity and competency of some other person." 20 Am. Jur., Evidence, §451.

The trial court admitted the paper, permitted plaintiff's counsel to read it to the jury upon the theory that—

³ On this appeal defendants noted certain other points under Rule 75(d) of the Rules of Civil Procedure. (App. 9, 10) Upon mature consideration, however, defendants' counsel have concluded that the remaining points, 2, 3, and 4, are not sufficiently meritorious to argue to this Court. Said points are, therefore, waived.

“It is clearly admissible if it is inconsistent with Mr. Sisto’s testimony”,⁴

and commented that defendants’ counsel could have asked Sisto if he had written this letter at the time Sisto’s deposition was taken.

Bearing in mind that the letter was addressed to a stranger to the transaction, and that defendants had no possible means of knowing of its existence, it was not incumbent upon them or their counsel to require Sisto to produce a copy of his letter to Milburn—if indeed he had one. Plaintiff produced and offered this evidence. As hereinafter pointed out, it might have been received had plaintiff complied with the essential conditions precedent that would have rendered it admissible. Plaintiff failed to meet these conditions.

It is not fitting here to review the exceptions to the hearsay rule and, by process of elimination, to arrive at the conclusion that the Sisto letter falls within none of them. Such, however, is the case. Rather, it seems appropriate to cite authority to support our view, strenuously urged, that the letter is hearsay and is not admissible either as an impeaching document or as a statement against interest: these exceptions to the rule, we submit, are the only ones under which the Sisto letter might have become admissible.

THE LETTER AS AN IMPEACHING DOCUMENT

In 1853 the Supreme Court of the United States decided the case of *Conrad v. Griffey*, 16 How. 38. Since that time it has been universally followed by our Federal courts as well as by the decisions in not less than thirty-two American jurisdictions. The rule is that before the credibility of a witness may be impeached by showing that he has at some other time made statements contradictory to his present

⁴ App. 80. It should be noted that, at the time of the trial court’s ruling upon this point, Sisto’s deposition had not been offered.

testimony, a proper foundation must be laid by asking him whether such statements were made and permitting him to explain any inconsistencies that thus appear.

In the case of *Conrad v. Griffey, supra*, there had been two trials. At the first trial, plaintiff introduced certain letters to corroborate the testimony of his witness, Nutz. When a new trial was granted, the testimony of Nutz was taken by the plaintiff by means of a deposition. At the time of the taking of this deposition, defendant did not attempt to introduce these letters in evidence, but at the subsequent, and second, trial he attempted to do so. The letters were offered on the ground that they contradicted the testimony of Nutz at the deposition.

The court declined to receive them, saying that no proper foundation had been laid at the time the deposition was taken. The ruling was affirmed by the Supreme Court of the United States, which said:

“The rule is well settled in England, that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to, unless on his examination he was asked whether he had not made such statements to the individuals by whom the proof was expected to be given. * * *

“This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain the statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony.

“This rule is generally established in this country as in England. * * * ‘The declaration of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the depositions, is inadmissible, if objected to. The only way for the party to avail himself of such declarations is to sue out a second commission.’ ‘Such evidence is always inadmissible until the witness, whose

testimony is thus sought to be impeached, has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation.'

*"This rule equally applies whether the declaration of the witness, supposed to contradict his testimony, be written or verbal. * * **

*"A written statement or deposition is as susceptible of explanation as verbal statements. A different rule prevails in Massachusetts and the State of Maine."*⁵

The rule so announced has been adopted and reaffirmed in the following Federal cases: *The Charles Morgan*, 115 U. S. 77, 5 S. Ct. 1176; *Mattox v. U. S.*, 156 U. S. 246, 15 S. Ct. 341; *U. S. v. Phelan*, 252 F. 891; *Lemon v. U. S.*, 164 F. 295; *B. & O. Railroad v. Darling*, 3 F. 2d. 987; *D. C. v. Chessin*, 61 App. D. C. 260, 61 F. 2d. 523; *Gordon v. Thomas*, 61 App. D. C. 148, 70 F. 2d. 752.

THE LETTER AS AN ADMISSION AGAINST INTEREST

Far from being an admission against interest, the Sisto letter is a self-serving declaration. Sisto was president of Barium Stainless Steel Corporation and a large stockholder in that company at the time Reily's associate, Milburn, asked him "where, what, when and why we, you or they [Johnston, Lemon & Company] should do about it [Reily's compensation]".⁶

Sisto replied, in effect, "Let Reily look to Johnston, Lemon & Company." Why not? If Reily pursued that course, the Barium company and Sisto were safe; otherwise Reily, being ready to sue someone, might sue Barium, Sisto, or both.

The Sisto letter was not an admission against interest; it was, in fact, a self-serving declaration.

⁵ Emphasis supplied; asterisks indicate omission of citations.

⁶ Paragraph 1, Sisto letter, App. 81.

THE LETTER WAS PREJUDICIAL TO DEFENDANTS

The Sisto letter was made full use of by plaintiff's counsel. Not only was it read to the jury, but plaintiff's counsel used it in jury argument to discredit Sisto's testimony. It was highly prejudicial to defendants.

Conclusion

For the foregoing reasons, it is submitted that the trial court erred in admitting the Sisto letter in evidence. Its weight must have helped to balance the scale against defendants; indeed it may have been decisive of the verdict.

The judgment should be reversed, and a new trial granted.

Respectfully submitted,

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BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 9267

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*United States Court of Appeals
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FILED OCT 21 1946

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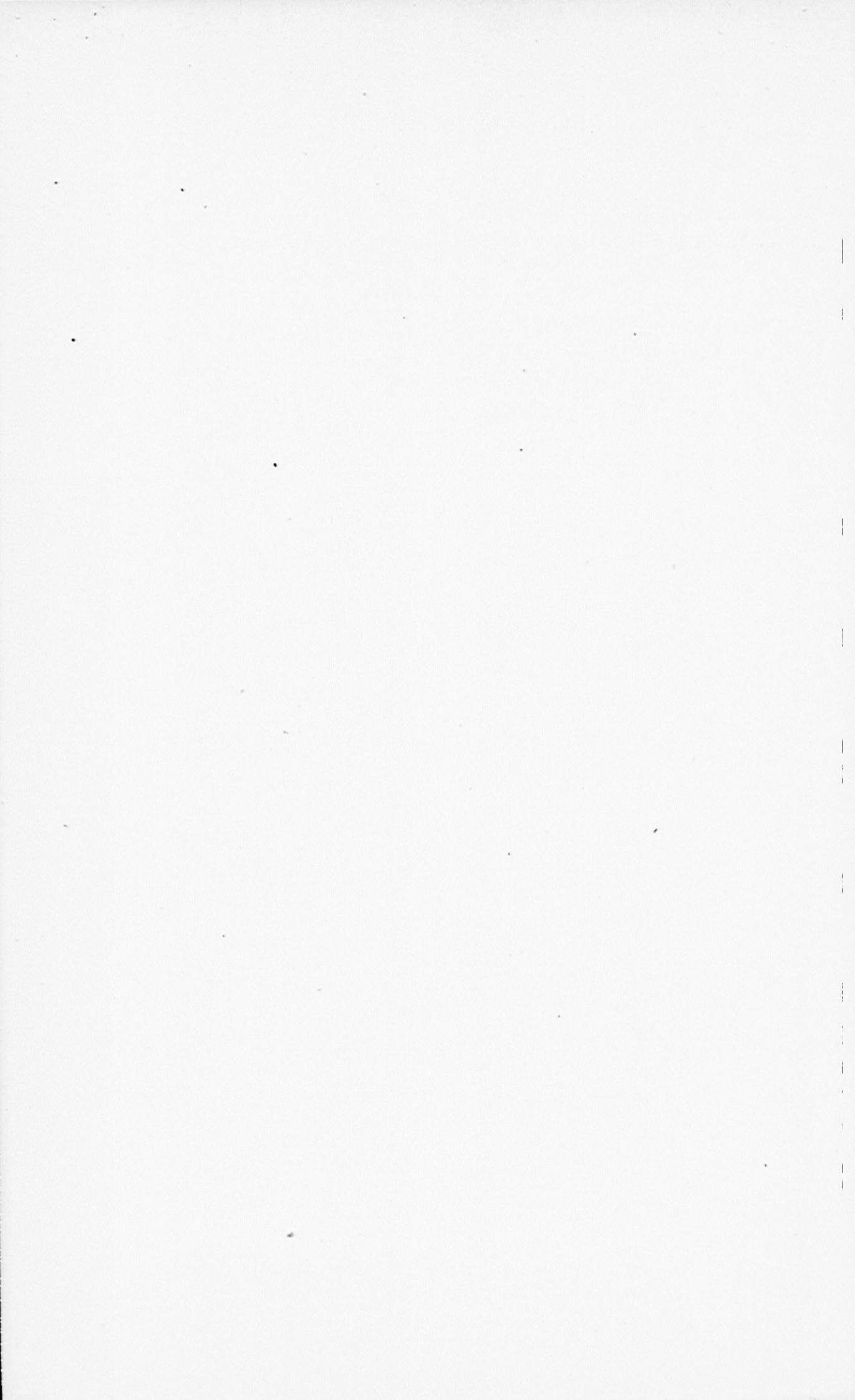
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 9267.

JAMES M. JOHNSTON AND JAMES LEMON, Trading
as Johnston, Lemon & Company, *Appellants*,

v.

PHILIP K. REILY, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF FOR APPELLEE.

COUNTER-STATEMENT OF THE CASE.

Plaintiff¹ below filed an action for breach of contract to require the defendants to deliver to him 3,500 shares of Barium Stainless Steel Corporation stock, or in the alternative that he recover of the defendants one-half of the

¹ For conformity with appellants' brief, appellee is referred to as plaintiff, and appellant as defendant. All references (App.) are to joint appendix to appellants' brief.

value of the stock plus half of the cash profits received by the defendants by reason of their participation as co-underwriters in the refinancing of the Barium Stainless Steel Corporation (App. 3). Plaintiff had been engaged in the general securities business for some 17 or 18 years and from 1934 to 1939 conducted his own business as a wholesale securities broker (App. 12, 14). In the latter part of 1939, plaintiff was employed by the defendants as a salesman and as compensation for his services he was to receive 50% of the profit of any transaction effected by him and accepted by the defendants (App. 19).

Prior to his employment by the defendants, plaintiff had been interested as a broker in the activities of the Barium Stainless Steel Corporation. Plaintiff had acted as the local distributor for the New York brokerage firm of J. A. Sisto & Company in the original offering of the Barium stock (App. 23). J. A. Sisto, was the president of the Barium Stainless Steel Corporation and also chairman of its Board of Directors and was well known personally to the plaintiff.

The Barium Steel Corporation experienced financial difficulties during 1938 and 1939 and plaintiff undertook to arrange for a sale or refinancing of the corporation (App. 24, 25, 26). Plaintiff procured the services of one T. Yancey Milburn, an industrial engineer with wide acquaintances in the steel industry, to assist him in this connection (App. 25, 26). At the time of his employment by defendants in 1939, plaintiff informed James Johnston, senior member of the defendant partnership, about his activities in connection with the Barium Stainless Steel Corporation, and indicated to Johnston that because of his employment by defendants he desired to have an understanding with defendants whether he should continue his efforts in connection with Barium Steel on his own responsibility or whether his efforts should be on behalf of the defendants as his employer (App. 20).

According to the plaintiff's testimony, an understanding was entered into between him and Johnston whereby it was

agreed that the plaintiff should continue his activities to effect a deal of some kind with Barium Steel in the name of the defendants and at their expense and that if any profits were realized by the defendants because of plaintiff's efforts, such profits were to be shared equally between them (App. 20, 21, 67, 68). The defendant Johnston, admitted the discussion with plaintiff at the time of his employment, but denied any agreement or understanding as testified to by plaintiff (App. 127).

Following his employment by defendants, plaintiff continued his efforts to refinance or to sell the Barium Steel Corporation, and in October of 1940, a refinancing was effected (App. 42). The defendants were offered and accepted a participation as co-underwriters in the refinancing (App. 43) and thereafter in March of 1942, the defendants received 7,000 shares of Barium Stainless Steel Corporation stock and the sum of \$1,544.12 in cash as their profit because of their participation as co-underwriters (App. 88). Plaintiff contended and offered proof to show that his services had assisted and contributed to the participation by defendants in the underwriting with the resulting profit to them. The jury found that a contract to share profits arising from the Barium Steel underwriting existed between the parties and that the plaintiff's services had contributed and assisted in having the defendants named as co-underwriters. The stock received having been sold by defendants, the jury found for the plaintiff in the sum of \$8,209.56 with interest from April 1, 1943 (App. 8).

ISSUES IN THE CASE.

The sole basis of appeal is the alleged error in the admission into evidence of a letter of November 18, 1940, from J. A. Sisto to T. Yancey Milburn.² It is plaintiff's contention that the letter was admissible under the issues and was properly admitted. The issues were twofold:

² For convenience, this letter is referred to as the "Sisto letter".

1. Whether or not an oral contract existed between the plaintiff and the defendant Johnston whereby any profits accruing to the defendants by reason of Reily's efforts in connection with the Barium Steel Company were to be equally divided between plaintiff and defendants.

2. Whether or not the plaintiff assisted and contributed in bringing about the choice of defendants as co-underwriters.

The Court instructed the jury that the burden of proof was on the plaintiff to prove the oral agreement between plaintiff and defendant Johnston and that the plaintiff had to prove by substantial evidence that plaintiff had assisted and contributed in bringing about the choice of defendants as co-underwriters (App. 104). Plaintiff and defendants so understood the issues. See Plaintiff's instruction No. 1 and Defendants' instruction No. 1 (App. 5, 6).

SUMMARY OF ARGUMENT.

1. The Sisto letter of November 18, 1940, to T. Yancey Milburn was properly admitted in evidence as primary proof tending to show that the plaintiff had assisted and contributed in bringing about the choice of the defendants as co-underwriters.

2. The Sisto letter was further admissible on the ground that it tended to contradict Sisto's deposition offered into evidence by defendants. No objection was made below that a foundation had not been laid to use the letter as a prior inconsistent statement. Such objection cannot be raised for the first time on appeal.

3. The defendants did not object to the letter at the time of trial on the ground now advanced on appeal. The objection here is that the letter is hearsay. At the trial, no specific objection was made to the letter. The general ground advanced at the trial was that it did not contain a direct statement of fact—that it was "precatory," and "equivocal." The defendant cannot complain on appeal

that the letter was inadmissible on a ground not advanced at the time of trial.

4. On the evidence in the case, the letter was not substantially material. The letter was cumulative of like evidence offered by plaintiff and admitted without objection by defendants. The verdict of the jury is supported by substantial evidence independent of the letter.

5. Defendants did not file a motion for new trial below. The right to appeal was waived by failure to file a motion for new trial.

ARGUMENT AND AUTHORITIES.

I.

The Sisto Letter of November 18, 1940, was Properly Admitted in Evidence as Primary Proof Tending to Show That the Plaintiff Had Assisted and Contributed in Bringing About the Choice of Defendants as Co-Underwriters.

A.

PURPOSE FOR WHICH LETTER WAS OFFERED.

Under the issues made in the case, and under the Court's instructions as contained in his charge to the jury, it became incumbent on the plaintiff to prove that his services were an active cause of the defendants' participation in the underwriting of the Barium Stainless Steel Corporation in 1940, and that he assisted and contributed in the choice of the defendants to participate in the underwriting.³

The Sisto letter of November 18, 1940, was offered in the course of the testimony of the witness Milburn as evidence tending to show that the plaintiff's services assisted to bring about the choice of the defendants as co-underwriters in the refinancing of the Barium Stainless Steel Corporation. For a clear understanding of the rela-

³ See Plaintiff's prayer No. 1 and Defendants' prayer No. 1 (App. 5, 6).

tion of the Sisto letter to the evidence given by the witness Milburn, a brief summary is given of this witness' testimony preceding the introduction of the letter into evidence.

The witness Thomas Yancey Milburn testified that he was a consulting industrial engineer engaged in business in the District of Columbia (App. 68) with extensive association with large engineering corporations (App. 69). The witness testified that he was approached by the plaintiff Reily in 1938 or 1939 for the purpose of securing witness' assistance to find some person who might be interested in helping to place the Barium Steel Corporation in a better financial condition than it was (App. 70).

For about a year, plaintiff and Milburn attempted without success to interest clients in the Barium company (App. 70). Reily was in and out of Milburn's office during this time and represented the motivating influence which kept the attempted deal going (App. 70). Reily and Milburn met Sisto on several occasions in New York prior to May, 1940, and they made some half dozen trips to New York in connection with Barium Steel and each time they saw Mr. Sisto (App. 71). Milburn suggested to Sisto that it would be desirable to have a change of directors on the Barium Steel board, and he suggested further to Sisto that one Admiral Conard should be appointed to the board to increase public confidence in the corporation. Thereafter the Admiral was made a member of the board in May or June of 1940 (App. 72). Sometime in the middle of 1940, Milburn secured a second extension on behalf of Barium Steel for a loan that was in default with the Reconstruction Finance Corporation (App. 73).

The witness testified that in September of 1940, plaintiff informed Milburn that he had information that Sisto was about to do business with someone else, and Milburn being apprehensive called Sisto by telephone on September 26, 1940, and the latter informed Milburn that he had a deal pending but would prefer to do business with Milburn and Johnston. Milburn gave this information to Reily and wit-

ness discussed the matter with defendant Johnston and a telephone call was made to Sisto requesting him to hold the matter in abeyance until witness, Reily and Johnston could get to New York (App. 73).

On October 17, 1940, Milburn, Reily and Johnston met at the office of Tobey & Co., a firm of New York stock brokers. Tobey & Co. at the time was considering the refinancing of the Barium Steel Corporation. At this meeting, a Mr. Eberstadt who was head of Tobey & Co., inquired of Milburn if he would come on the board of directors of the Barium Stainless Steel Corporation and further if Milburn would attempt to have Admiral Conard remain on the board (App. 76). This was arranged and the agreement of Milburn and Admiral Conard to go on the board was a factor in the decision of whether Tobey & Co. would finance Barium Steel (App. 75, 76).

At this state of the testimony, plaintiff's counsel continued the introduction of evidence to show that plaintiff's services assisted to bring the defendants into the financing of Barium Steel as a co-underwriter with the resulting profits to defendants. The testimony at this point bearing on the sole matter raised on appeal is quoted for convenience from App. 76, 77, 78:

Q. With whom were you dealing in New York before you learned of Mr. Eberstadt of the Tobey & Company? A. J. A. Sisto.

* * * * *

Q. Then after you learned of Tobey & Company, and were in contact with Mr. Eberstadt of Tobey & Co., were you also in contact with a Mr. Sisto? A. Oh, yes; yes, I saw Mr. Sisto—well, I was going to New York then once a week, sometimes twice a week and I would usually drop by or call him on the phone, or try to find out what I could.

Q. Do you know how Johnston, Lemon & Company got into the picture? A. Yes, they were directed to Tobey & Company by Sisto.

* * * * *

Q. Did you ever discuss the matter with Mr. Sisto?

The Court: Discuss what matter?

Mr. Offutt: Of how they got into the picture.

The Court: Of how who got into the picture?

Mr. Offutt: Of how Johnston, Lemon & Company got into the refinancing.

The Witness: Well, Mr. Offutt, after this meeting of the 17th, which I returned to Washington with inconclusive contracts as far as I was concerned at that time, there was an exchange of letters between my office and Mr. Eberstadt in which I outlined what I would do and what I would expect to be paid for it, which ultimately culminated in his making an offer to me to go into the company as vice-president and onto the board. The next information I had was about November 8 when a notice was put on the wire, and also a letter from the Johnston, Lemon Company which was an announcement that the entire deal was set up, and it named Admiral Conard as chairman, and myself as vice-president—I don't know whether it named Admiral Conard, or not, because he was already on the board—but it named my entrance to the company; and shortly after that I wrote to Mr. Sisto a personal letter and asked him, I said that Admiral Conard seemed to be taken care of and I seemed to be taken care of, and that Mr. Reily, who had probably done as much or more in the thing than we had—I think I asked him very facetiously how, when, where, what and why he was going to be taken care of. He wrote me back and said that inasmuch as he had directed Johnston, Lemon & Company to Tobey & Company, that he assumed that Johnston, Lemon & Company would take care of Mr. Reily.

By Mr. Offutt:

Q. That was Mr. Sisto you are talking about now?

A. That was Mr. J. A. Sisto.

Q. Do you have that letter? A. Yes.

Q. May I see that sir? A. I think I have it here; yes, here it is.

From the foregoing it is apparent that all the testimony given by the witness Milburn from the time Reily solicited his assistance until the Sisto letter was offered into evidence was given for the purpose to prove performance by the plaintiff of the services on which the suit was brought. Of necessity, a great deal of the testimony narrated involved conversations and correspondence not made in the presence of or addressed to the defendants. But the purpose was to prove performance of the plaintiff's services and to show that plaintiff had assisted to have defendants named as co-underwriters. The trial Court as will be shown later admitted the letter for what worth it might have in tending to prove performance. Defendants themselves must have accepted the competency of the testimony for the purpose offered as no objection was made to any of the oral testimony offered by Milburn and Plaintiff and which was of no different a nature than the Sisto letter as to being hearsay.

The admissibility of such testimony in this jurisdiction for the purpose stated appears in the case of *Lucas v. Hamilton Realty Corporation*, 70 App. D. C. 134, 122 F. 2d 627, wherein the Court stated:

Other assignments which we think should be noticed relate to the rejection on a different ground of other evidence in relation to the services claimed to have been rendered by plaintiffs in effecting the agreement. Plaintiff Lucas, while on the stand, was asked to testify as to the price at which Loveless had told him the hotel property could be purchased and as to his communication of this information to Manager. He was likewise asked to testify as to conversations with O'Brien, chief accountant and auditor for Manager. Other questions were intended to elicit information in relation to the activities of the plaintiffs both with Manager and his subordinates and with the sellers. While the objections and the rulings of the Court do not in every instance show the ground upon which they were based, *apparently the exclusion was because the trial court thought the evidence was hearsay. On the*

other hand, the ground on which it was offered was that it had a tendency to show that the plaintiffs were the efficient cause of the exchange of the property. In other words, it tended to prove performance by plaintiffs of the services on which the suit was based, and not to prove the truth of what was said. We think the rejection was erroneous and that the evidence should have been admitted.

The general rule where, as in this case, the fact in issue is whether the plaintiffs were the active and efficient cause of a sale, is that conversations tending to show how they procured the sale and carried through the negotiations are direct and primary evidence on that issue. (Citing cases) (Italics supplied).

no. App.

Similar to the present case is *Minter v. Rothschild*, 186 S. W. 753, where the Court stated:

In sustaining the objections to the evidence offered by defendant which we have noted, the Court seems to have been under the impression that such evidence was hearsay as to the plaintiff, and therefore had no evidentiary value in this controversy where the issues were: First, did defendant employ plaintiff as his agent to perform a stated task, and second, did plaintiff perform that service in a manner to entitle him to receive the promised reward?

Defendant attempted to show in his defense that he did not employ plaintiff, and that plaintiff did not render any effective service—was in no sense the procuring cause of the sale. The state of the negotiations was a fact which had an important bearing on both these issues. . . . The proposals exchanged through the agencies of Beedle and Weber and the correspondence between Weber and Biggs and defendant had a tendency to show that the terms of the sale had been practically agreed upon at the time plaintiff claims he was employed. . . . The condition the negotiations were in at that time was the real subject matter of the alleged employment, and both parties were entitled to go into the particulars of that question. *The evidence excluded was not hearsay, was not merely cumu-*

lative, but had independent probative value and should have been admitted. (Citing cases) (Italics supplied).

The rule is stated in *George A. Fuller Co. v. Ford*, 63 F. 2d 889:

P 890—The evidence admitted on behalf of appellee, over objection, consisted of letters and telegrams from Flynn to appellee tending to prove negotiations leading up to the sale of the property, of demand by appellee upon appellant after the sale had been completed for the commission of a contract between the owner and the purchasers, and of a deed from the former to the latter. These documents were clearly admissible as they tended to show that as alleged, appellee procured a prospective purchaser to whom the sale was actually made.

Hammond et al. v. Yona Varah Realty Corp., 222 App. Div. 1, 225 NYS. 254:

It seems to us to be perfectly relevant to receive such proof, so that the owner or the borrower may show his efforts, negotiations and conversations with a purchaser or with a lender in the absence of the plaintiff to demonstrate that he, as such owner or borrower, and not the plaintiffs procured the loan or sale.

See also *Williams v. Sanderson*, 150 Ark. 151, 233 S. W. 1093, and *Cohen v. Compton*, 43 S. W. (2d) 454, *Hann v. Rosenmayer*, 189 P. 117, 46 Cal. App. 353

The questions leading to the Sisto letter were for the purpose of showing performance by plaintiff in assisting and contributing to have the defendants named as co-underwriters. The question leading to the introduction of the letter was "do you know how Johnston, Lemon & Co. got into the picture?" The question and answer related to a matter squarely raised by the issues. The parol testimony of Milburn as to the substance of the letter having gone into evidence without objection (App. 78), it was logical and proper to offer the letter, if available.

PURPOSE FOR WHICH LETTER ADMITTED BY COURT.

The letter was admitted by the Court as tending to show performance by the plaintiff and was admissible under the rule stated in *Lucas v. Hamilton Realty Corp.*, supra. This is shown upon a consideration of the statement of the trial judge, App. 79:

The Court: I think if you can prove this to be Sisto's letter that it ought to go in for what it is worth, because one of the very critical things here is that this plaintiff was the one responsible for Johnston, Lemon & Company being named as a participating member. That is really one of the critical questions.

The authenticity of Sisto's signature was admitted by the defendants (App. 81). The letter was evidence bearing on the issue as to whether plaintiff's services were an efficient cause of defendant's participation as a co-underwriter. Under the authorities, the letter was clearly admissible. It is not correct to say that the letter was received only as an impeaching document. The last statement of the Court so indicates (App. 80):

Mr. Myers: May it please the Court, may I say that there is nothing directly stated by the witness here. He only infers and feels and assumes. It is no direct statement.

The Court: Certainly not. I am not going to the weight of it. But I am talking about it is in reply to what the witness says he wrote him that this man had done as much or more than any of them and how he is going to be taken care of and this is his reply. I think it is pertinent.

II.

The Sisto Letter was Further Admissible on the Ground That It Tended to Contradict Sisto's Deposition Offered in Evidence by Defendants. No Objection was Made Below That a Foundation Had Not Been Laid to Use the Letter as a Prior Inconsistent Statement. Such Objection Cannot be Raised for the First Time on Appeal.

The trial court in considering the admissibility of the Sisto letter stated that it was admissible if inconsistent with Sisto's testimony (App. 80). Sisto's deposition was offered into evidence by the defendants (App. 117, 118, 119). The letter was inconsistent with the deposition. Because of this, the letter became admissible as evidence for the plaintiff as a prior inconsistent statement by the witness Sisto. The authenticity of Sisto's signature on the letter was admitted by defendants (App. 81). The defendants did not make any objection below that no foundation had been laid to admit the letter, and no objection having been made on such ground, the objection will be deemed to have been waived.

Rule 46 of the Federal Rules of Civil Procedure provides that a party must make known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor.

The rule was construed in *Tucker v. Loew's Theatre & Realty Corp.*, 149 F. (2d) 677, in which case the Court stated:

Defendant further objects to the admission of the hospital records showing treatment of plaintiff after the accident. The objection it now stresses that the record shows defendant to have been insured, was certainly not brought to the judge, as required by Federal Rule of Civil Procedure 46, 28 U. S. C. A. following section 723c, by the simple objection of "hearsay."

To the same effect is *Virgina-Carolina Tie & Wood Co., Inc. v. Dunbar*, 106 F. (2d) 383:

The next question relates to the action of the Court in overruling objections to the testimony it is a sufficient answer to the objections thereto that no ground of objection was stated as required by Rule 46 of the Rules of Civil Procedure; and this case furnishes a good illustration of the wisdom of that requirement. If plaintiff had given in the lower court such grounds of objection as are urged here and there had been reason to think that the witness was not thoroughly familiar with the boundaries of the land, the Court would doubtless have required defendant to fit the deed to the land more specifically. Such general objections would not have been good even under the practice prevailing in the Federal Courts prior to the adoption of the rules of civil procedure, (citing cases).

Specifically, the Courts have uniformly held that failure to object to the laying of a foundation before the introduction of impeachment evidence amounts to a waiver of the objection. As stated in *Baxter v. Woodward*, 191 Mich. 379, 158 N. W. 137:

The argument is to the effect that no foundation was laid for such impeaching questions. A reference to the record shows that no such objections were made at the trial. The questions were objected to as immaterial. The attention of the trial court was not called to the question discussed by counsel. We cannot consider an objection to evidence not brought to the attention of the trial court or based upon exception.

The same rule is stated in *Weeks v. Hutchinson*, 135 Mich. 160, 97 N. W. 695:

It is now said Mr. Bartley's attention had not been called to this conversation, and therefore the proper foundation had not been laid. If that objection had been made in the Court below, it doubtless would have been sustained, and the foundation for admitting the testimony could have been laid before the witness was

allowed to testify. That objection, however, was not made, and it is too late to make it here for the first time (citing cases).

The general rule is stated in 3 C. J. S. 589, par. 296:

In the absence of proper and specific objection or motion to strike in the trial court, objection cannot be raised on appeal to the method of impeaching a witness or the admission of impeaching evidence, or the failure to lay a proper foundation for impeachment and no grounds of objection other than those urged in the trial court will be considered by the appellate court.

See also, *Goss v. Goss, et al*, 102 Minn. 346, 113 N. W. 690; *Harrison v. Incorporated Town of Ayrshire*, 123 Iowa 528, 99 N. W. 132; *Trenerry v. Fravel*, 56 App. D. C. 146, 10 F. (2d) 1011; *Dixon v. Great Falls & O. D. R. Co.*, 43 App. D. C. 206; *Liberty Life Assurance Soc. v. Woodard*, 121 So. 30, 219 Ala. 24.

III.

The Defendants Did Not Object to the Letter at the Time of Trial on the Ground Now Advanced on Appeal. The Objection Here is That the Letter is Hearsay. At the Time of the Trial No Specific Objection was Made to the Letter. The General Ground Advanced was That It Did Not Contain a Direct Statement of Fact—That It was “Precatory”, and “Equivocal”. The Defendant Cannot Complain on Appeal That the Letter was Inadmissible on Any Ground Not Advanced at the Time of the Trial.

The defendants' objection to the Sisto letter at the trial was not based on the ground that it was hearsay. This objection is raised for the first time on appeal. At the trial, the objection to the letter was because it was “equivocal,” “precatory,” and that “there was nothing directly stated by the witness.” Citing from App. 79, 80.

The Court: What is your objection?

Mr. Towers: My objection is to the second paragraph in particular which contain a feeling where he says he feels certain that certain things were going to take place. I can't cross-examine Mr. Sisto on this subject and there is an implication there that I am sure is not justified by the facts in this case. It is a kind of precatory expression on the part of the writer.

* * * * *

The Court: I think if you can prove this to be Sisto's letter that it ought to go in for what it is worth, because one of the very critical things here is that this plaintiff was the one responsible for Johnston, Lemon & Company being named as a participating member. That is really one of the critical questions.

Mr. Towers: Well, in the second paragraph of this letter the expression is very equivocal.

The Court: It may be, and you may argue that it means thus and so, and he may argue differently, but I am talking now about here is a statement by the man who is one of the principals in these negotiations and you are relying quite a bit, as I understand it, on his testimony, or at least your statement to the Court was that you were.

* * * * *

Mr. Myers: May it please the Court, may I say that there is nothing directly stated by the witness here. He only infers and feels and assumes. It is no direct statement.

The Court: Certainly not. I am not going to the weight of it. But (sic) I am talking about it is in reply to what the witness says he wrote him that this man has done as much or more than any of them and how is he going to be taken care of, and this is his reply. I think it is pertinent.

Obviously the objection made to the trial court was that the letter was not a statement of fact and that it being "equivocal" and there "being nothing directly stated by

the witness" it should not be admitted. The Court stated that the expression was a matter to be argued to the jury and for the jury to determine the weight and significance to be given to the expression used in the letter.

The objection below being based on the uncertainty of expression used and the objection on appeal being based on claimed hearsay, the appeal must fail for reason that the appellant will not be heard on an objection raised for the first time on appeal. See Rule 46 of the Federal Rules of Civil Procedure; *Tucker v. Loew's Theatre & Realty Corp.*, supra, *Virginia-Carolina Tie & Wood Co., Inc. v. Dunbar*, supra.

The rule applicable prior to the adoption of Rule 46 of the Civil Rules of Civil Procedure is stated in *Niagara Fire Insurance Co. v. Raleigh Hardware Co.*, 4 Cir. 62, 62 F. (2d) 705, 710:

P. 710—But before defendants can rely upon these points here, they must have made them in the Court below, not by general objection or motion to strike out, but in a manner specifically calling the attention of the trial judge to the point made.

This rule has been followed in this jurisdiction. See *Andrews v. Haller Wall Paper Co.*, 32 App. D. C. 393, where the Court stated:

The first assignment of error relates to the admission in evidence of the books of account of plaintiff. The objection being general, we will not consider it here. The specific ground of objection should have been stated.

See also, *W. T. Walker Furniture Co. v. Dyson*, 32 App. D. C. 90; and *Equitable Surety Co. v. National Capital Bank*, 51 AppDC 289, 278 Fed. 1002.

IV.

On the Evidence in the Case, the Letter Was Not Substantially Material. The Letter was Cumulative of Like Evidence Offered by Plaintiff and Admitted Without Objection by Defendants. The Verdict of the Jury is Supported by Substantial Evidence Independent of the Letter.

The plaintiff in the course of his direct examination testified without objection as follows (App. 41):

Q. Did anything further happen at that conference?

A. At that time, I of course was thinking of myself and Johnston, Lemon & Company. I asked Mr. Sisto what provisions would be made to take care of me, of the work that I had done over the preceding twelve months or more, for Johnston, Lemon & Company, and he told me then in Mr. Milburn's presence that he would insist that the firm that he was negotiating with would permit my firm to participate in that business if they desired to do so.

The witness Milburn testified without objection to the contents of the Sisto letter (App. 77, 78). He stated in discussing the Sisto letter that after he entered on the Board of the Barium Stainless Steel Corporation that he:

"wrote a personal letter and asked him, I said that Admiral Conard seemed to be taken care of and I seemed to be taken care of, and that Mr. Reily who had probably done as much or more in the thing than we had—I think I asked him very facetiously how, when, where, what and why he was going to be take care of. He wrote back and said that inasmuch as he had directed Johnston, Lemon & Company to Tobey & Company, that he assumed that Johnston, Lemon & Company would take care of Mr. Reily."

No objection was made to the testimony and no motion was made to have it stricken (App. 80).

On cross-examination of the defendant Johnston, the defendant was cross-examined at length as to the Sisto letter

and during the cross-examination the letter was read and gone over fully. (See App. 132). The cross-examination and reading of the letter at time of cross-examination were made without objection.

It follows that even if the Court on proper application had excluded the Sisto letter of November 18, 1940, as substantive evidence or as tending to contradict Sisto's deposition, the letter or other like evidence as shown would have been before the jury. Assuming without conceding that it was error to admit the letter, the admission was harmless and on appeal can and should be disregarded. The Federal courts have so held since the adoption of the Federal Rules of Civil Procedure. In *Woods v. Gettelfinger*, 108 F. (2d) 549, the Court stated:

Defendants introduced a witness, Langford who after giving his experience in such matters, testified that from his examination of the wreckage, the Chevrolet was traveling at the rate of about seventy miles per hour. Again there is a conflict in the authorities as to the admission of such evidence. . . . However, that is immaterial in this case. There was other evidence to show that the Chevrolet was traveling at an excessive rate of speed from which the jury could have properly formed their own opinion. The evidence could not have affected the substantial rights of the plaintiff. On appeal, its admission may be disregarded. Rule 61, Rules of Civil Procedure, 28 U. S. C. Par. 39.

See also (*American*) *Lumbermens Mutual Casualty Co. of Illinois v. Timms & Howard, Inc.*, 108 F. (2d) 497; *Virginia-Carolina Tie & Wood Co. Inc. v. Dunbar*, *supra*.

Rule 61 of the Federal Rules of Civil Procedure is declaratory of the law recognized in Federal Courts before the adoption of the present rules. As stated by this Court in *Patten v. Pinkney*, 60 App. D. C. 224, 50 F. (2d) 898:

"The question raised by the proponent's objection to the testimony of witness John W. Green, to the effect that Mr. Patten, the executor, had told witness that the

blanks 'were filled in a few weeks afterward', is not free from doubt. But this evidence was cumulative only, and if it were stricken out the remaining proof would nevertheless establish the facts upon which the court's ruling was based. We do not regard the question as controlling in this appeal."

Equitable Surety Co. v. National Capital Bank, 278 Fed. 1002, 51 App. D. C. 289, ruled on the point raised here:

Moreover, as already intimated, the substance of these letters had been brought to the attention of the Court through the cross-examination of Mr. Hurley, so that appellant could not have been prejudiced.

In this connection the point is made that the verdict is supported by substantial evidence irrespective of the letter and should be permitted to stand on this basis alone. Plaintiff testified that prior to his employment by defendants he had expended much time to effect a deal of some kind in connection with Barium Steel. Following his employment by defendants, he continued his efforts. In conjunction with Milburn, he tried to effect a merger of Barium Steel with another company (App. 26) and when this failed a company was formed to lease the Barium plant for a year (App. 27).

The graphic evidence of the relationship of plaintiff and defendants in their association is shown in the attempt to lease the Barium plant made by plaintiff. When the proposed lease was drawn, plaintiff carried the lease agreement to Sisto in New York and obtained from Sisto a letter addressed to Johnston, Lemon & Company, whereby Sisto agreed to pay to defendants a certain percentage if a sale or lease of Barium Steel was made (App. 34). This evidence taken in connection with a letter written by defendants on February 28, 1940, to Sisto referring to Reily's work (App. 35) amounts to an acknowledgment by defendants of plaintiff's association with them in working on the Barium deal and which efforts were finally culminated

in defendants being named as co-underwriters in the underwriting.

Defendant Johnston contended that plaintiff was not engaged in trying to make a deal with Barium Steel as defendants' representative (App. 127), but the fact that plaintiff's expenses in connection with the Barium Stainless Steel Corporation were paid by defendants is an admission or acknowledgment by defendants that plaintiff's efforts were on their behalf (App. 103). The receipt for plaintiff's expenses in connection with Barium Steel (App. 103) bearing date of March 4, and March 5, read in connection with Sisto's letter of March 5 (App. 34) obtained by plaintiff from Sisto while plaintiff was in New York is practically conclusive of plaintiff's contentions in the case.

Plaintiff's testimony showed that he and Milburn initiated the arrangements whereby Tobey & Company undertook to refinance Barium Steel and to bring defendants in as co-underwriters. Plaintiff and Milburn had contrived to bring Admiral Conard to the Barium Steel board (App. 37, 38). Sisto at that time found it necessary to have Admiral Conard to remain on the board of directors and to have Milburn to agree to come on the board in order to have Tobey & Company to refinance the corporation. To accomplish this, Sisto called plaintiff and requested him to try to have Admiral Conard and Milburn to cooperate (App. 39, 40). This was the decisive requirement as a prerequisite to Tobey & Company taking over the refinancing of the corporation. This was further discussed in a meeting between Sisto, plaintiff, and Milburn in New York in October of 1940 (App. 41), and it was at this meeting that Sisto assured plaintiff that as compensation for his services, he, Sisto, would permit defendants to participate in the underwriting (App. 41). This meeting was followed by another conference between the same parties and Tobey & Company, but at this meeting, defendant Johnston was present (App. 41, 42, 43). At this meeting, defendants were granted 20% of the underwriting of

Barium Steel (App. 43). The official prospectus of Barium Steel bore out plaintiff's testimony in all respects (App. 44, 45, 46, 47, 48).

V.

Defendants Did Not File a Motion for New Trial in the Court Below. The Right of Appeal was Waived by Failure to File a Motion for New Trial.

There appears to have been no decision under the rules of Federal Procedure as to whether or not a motion for a new trial has to be filed in an action tried before a jury before an appeal can be taken. The Rules do not clearly indicate if a motion for new trial must be filed. Under Rule 46 and Rule 49 of the Federal Rules of Civil Procedure it would appear to be the intention of the rules that the trial judge should be apprised of the error complained of and that all efforts should be exhausted to cure any errors in the trial court before the right of appeal should be exercised.

For the reasons stated, the point is reserved and made a basis of the plaintiff's objection to the defendants' appeal.

CONCLUSION.

All the evidence in the case pointed to certain conclusions:

1. The plaintiff's efforts brought about the selection of defendants as co-underwriters in the refinancing of Barium Stainless Steel Corp. The substantial evidence on all the testimony revealed that plaintiff's constant and untiring efforts culminated in defendants being brought in as co-underwriters.

2. The jury's finding that plaintiff had an understanding with defendants to be paid one-half of the profits he might earn for defendants and that he had enabled defendants to earn the underwriters commission was based on substantial and competent evidence.

3. The Sisto letter was properly admitted, and in any event, no proper objection was taken to its admission into evidence. Without the Sisto letter, the evidence showed that plaintiff's efforts had made possible the defendants' earning of the underwriters commission and that he was entitled to one-half of such profits.

It is submitted that the finding of the jury should not be disturbed and that the judgment of the lower court should be sustained.

Respectfully submitted,

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